86-419

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1986

ERNEST S. PATTON, RONALD J. MARKS,
J. HARVEY BELL and WILLIAM HARRISON,
Petitioners

v.

GREGORY S. SOURBEER,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a broad view of what constitutes a "clearly established right," which requires non-lawyer, middle-management executive officials to foresee the application of general legal principles to new and different circumstances in order to avoid liability for damages, is consistent with the underlying purpose of qualified immunity.

2. Whether the Court of Appeals' formulation of the qualified immunity standard conflicts with decisions of other Courts of Appeals.

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PARTIES TO THE PROCEEDING

Petitioners are current or retired officials of the Pennsylvania Department of Corrections: Ernest S. Patton, Ronald J. Marks, J. Harvey Bell and William Harrison.

Respondent is Gregory S. Sourbeer.

OPINIONS BELOW

The opinion of the panel of the Court of Appeals is reported at 791 F.2d 1094 (3d Cir. 1986), and a copy may be found in the appendix at 11a-90a. The order of the Court of Appeals denying rehearing in banc is not reported, but is reproduced in the appendix at 1a. The opinions of the District Court (App. 91a, 140a) are not reported.

STATEMENT OF JURISDICTION

The order of the Court of Appeals sur petition for rehearing in banc was issued on June 19, 1986. This petition for writ of certiorari has been filed within ninety days of that date. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1

STATUTE INVOLVED

The Civil Rights Act of 1871, c.22, §1 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

> privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

1. Following a non-jury trial in the United States District Court for the Middle District of Pennsylvania, defendants Ernest S. Patton, Ronald J. Marks, J. Harvey Bell and William Harrison, current or retired officials of the Pennsylvania Department of Corrections, were found liable to Gregory Sourbeer, a prison inmate, for compensatory damages in the amount of one-thousand nine-hundred seventy dollars ($1,970.00). App. 139a. The action was brought under the Civil Rights Act of 1871, 42 U.S.C. §1983, claiming violations of Sourbeer's right to due process, equal protection and freedom of religion, allegedly arising in connection with his placement in administrative segregation status at a state prison in 1976-77. The Court of

Appeals for the Third Circuit, by a divided court, affirmed the award of damages and remanded. Sourbeer v. Robinson, 791 F.2d 1094 (3d Cir. 1986). On the corrections officials' petition for rehearing in banc, App. 3a, rehearing was denied with four judges voting to grant the petition. App. 1a.

2. On October 4, 1976, Sourbeer was convicted of first degree murder by the Court of Common Pleas of Lancaster County, Pennsylvania for the shotgun slaying of his mother. See Commonwealth v. Sourbeer, 492 Pa. 17, 422 A.2d 116 (1980). He was transferred from a county jail to a state prison as a convicted but unsentenced prisoner because county officials considered him a security risk for their jail and believed he could receive proper supervision in a maximum security unit such

as that provided by a state prison. App. 13a, 95a-96a. Upon his arrival at the state institution, Sourbeer was placed in administrative segregation status--a restricted confinement separated from the general inmate population--and he remained there for approximately twelve months. App. 97a. He returned to the court of common pleas for sentencing in October 1977. App. 97a. In November and December 1977, he was classified by state authorities for the general inmate population and was released from segregation. App. 118a. He remains at the same prison at the present time serving a life sentence.

Approximately every thirty days between October 1976 and October 1977, a three-member institutional Program Review Committee at the state prison conducted a review of Sourbeer's status in

segregation. App. 109a, 127a. At each review session, with the exception of the very first one held the day after he arrived at the prison, Sourbeer was given an opportunity to appear, to question the committee, and to present any concerns he may have had. App. 109a-115a. The committee reviewed the inmate's counselor's notes and recommendations, the block officers' notes and observations, other staff members' observations of his attitude and actions, the status of his sentencing proceeding in the court of common pleas, and his actions and attitude at the review session itself. App. 106a, 118a. The review committee decided to retain Sourbeer in segregation and the Superintendent of the prison concurred.[1] App. 18a.

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[1] Petitioners are the Superintendent of the state prison at that time and the officials who served as members of the review committee. 791 F.2d at 1097; App. 18a.

3. Sourbeer filed his § 1983 complaint in 1979 alleging, primarily, that his placement and retention in administrative segregation status violated his rights to due process and freedom of religion. 791 F.2d at 1098; App. 24a. Upon a set of stipulated facts, the parties filed cross-motions for summary judgment which the District Court denied. 791 F.2d at 1099; App. 24a. The corrections officials had moved for summary judgment on all claims, but specifically had requested judgment on the due process claims by reason of good-faith immunity under Harlow v. Fitzgerald, 457 U.S 800 (1982). By memorandum opinion dated August 2, 1984, the District Court denied reconsideration of its decision not to accord

the officials good-faith immunity. App. 140a. In that opinion, the District Court concluded that the law governing administratively segregated prison inmates in 1976-77 "fairly established that some process was due plaintiff in the instant case...," and, although the cases relied upon by Sourbeer to abrogate the officials' immunity were, as the court found, "factually distinguishable," they nevertheless were determined to have placed the officials on sufficient notice so that their periodic reviews of Sourbeer would have to be tested at trial. App. 146a-147a.

Following trial, the District Court concluded that the corrections officials had violated Sourbeer's right to procedural due process by conducting the thirty-day reviews in what it considered a "grossly negligent" manner.

App. 133a-134a. The court found no violation of due process in the inmate's initial placement in segregation nor in the officials' reviews conducted from October 1976 to April 1977. App. 127a. But, the District Court concluded that, beginning in April and continuing for the next 197 days, the officials had violated Sourbeer's right to procedural due process because, in its view, the officials had conducted their reviews "in a rote fashion." 791 F.2d at 1099; App. 36a. As a result, the court awarded Sourbeer $1,970.00, representing ten dollars a day for 197 days of segregated confinement. App. 138a. The court failed to discuss the immunity issue, presumably relying upon its pretrial opinion of August 2, 1984. App. 140a.

4. Cross-appeals were filed to the Court of Appeals for the Third Circuit.[2] On May 28, 1986, a divided panel of the Court of Appeals concluded that Sourbeer's procedural due process rights had been violated in 1977 and declined to afford the corrections officials good-faith immunity from damages under Harlow v. Fitzgerald. See 791 F.2d at 1099-1105; App. 36a-58a. The dissent would have reversed the district court and entered judgment for the officials based on Harlow. 791 F.2d at 1108-1110 (Weis, J., dissenting); App. 75a-90a.

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2 Sourbeer appealed the District Court's rejection of his freedom of religion claim, the finding of no liability for the October 1976 to April 1977 reviews, and the adequacy of the damage award. 791 F.2d at 1096, 1102, 1105; App. 27a. The corrections officials appealed the finding of a due process violation and the failure of the trial court to afford good-faith immunity. 791 F.2d at 1096, 1103; App. 26a-27a.

On the issue of immunity, the panel majority recognized that it was adopting a "broad view of what constitutes an established right" for purposes of Harlow immunity analysis. 791 F.2d at 1103; App. 44a-45a. The majority examined three decisions from the Third Circuit relied upon by Sourbeer and the District Court to preclude immunity. It concluded, as had the District Court, that despite those decisions' factual differences from the present case and despite the fact that this Court in Hewitt v. Helms, 459 U.S. 460 (1983) categorically had rejected the premise underlying those decisions, the cases nevertheless "clearly established within the meaning of Harlow" Sourbeer's procedural due process rights while he was in administrative segregation in 1977. 791 F.2d at 1103-04; App. 45a-51a. The

District Court's award of compensatory damages accordingly was affirmed.[3] 791 F.2d at 1105; App. 51a.

In dissent, Judge Weis would have found Harlow immunity based on his distinguishing the cases relied upon by the majority and his belief that the court had not remained true to the Harlow standard of affording immunity unless the law was "clearly established." 791 F.2d at 1110; App. 81a-89a.

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[3] The Court of Appeals rejected Sourbeer's First Amendment claim as well as his contention that damages of ten dollars per day were inadequate. 791 F.2d at 1102, 1105; App. 41a, 58a. It remanded, however, for the district court to reconsider its finding of no liability for the October 1976 to April 1977 reviews in light of its holding that Sourbeer's right to procedural due process had been sufficiently established in 1977. 791 F.2d at 1100-1101; App. 30a-40a.

The corrections officials filed a petition for rehearing in banc (App. 3a) in which they suggested that the majority's extension of the three decisions relied upon to abrogate immunity, as well as the court's admittedly "broad view" of the immunity standard, deviated significantly from the holdings of this Court in Harlow v. Fitzgerald; Mitchell v. Forsyth, No. 84-335 (June 19, 1985); and Davis v. Scherer, 468 U.S. 183 (1984). App. 3a. By order dated June 19, 1986, the Court of Appeals denied rehearing in banc, with Judges Adams, Hunter, Weis and Garth voting to grant the petition for rehearing. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS' DECISION ON THE STANDARD TO BE APPLIED WHEN CONSIDERING STATE OFFICIALS' GOOD-FAITH IMMUNITY UNDER 42 U.S.C. §1983 INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW AND CONFLICTS WITH DECISIONS OF THIS COURT REQUIRING IMMUNITY UNLESS THE RIGHT WAS CLEARLY ESTABLISHED.

A. Under Harlow v. Fitzgerald, 457 U.S. 800 (1982), executive branch officials performing discretionary functions are entitled to immunity from damages for civil rights violations unless the constitutional right claimed to be violated was "clearly established" at the time the officials acted. 457 U.S. at 818-19. In adopting a standard based upon the objective reasonableness of official conduct, the Court in Harlow expressly recognized "the need to protect officials who are required to exer-

cise their discretion and the related public interest in encouraging the vigorous exercise of official authority." 457 U.S. at 807. This standard, the Court observed, should avoid disruption of government services and permit the resolution of many insubstantial civil rights claims by summary judgment. 457 U.S. at 819.

The immunity afforded by Harlow is to apply unless the law was "clearly established." This standard does not permit "hindsight-based reasoning," Mitchell v. Forsyth, No. 84-335 (June 19, 1985) Slip Op. at 23; the only relevant inquiry is whether, under the state of the law as it existed when the official acted, the official's conduct was "objectively reasonable" as measured by clearly established law. Davis v. Scherer, 468 U.S. 183, 191 (1984).

Qualified immunity for executive branch officials represents an accommodation between competing values: the importance of a damages remedy and the need to protect the vigorous exercise of official authority. Harlow, 457 U.S. at 807. The "clearly established" standard is intended to strike a balance between these competing concerns. But as the Third Circuit has recognized, Harlow does not answer the important question of the standard to be applied in analyzing whether prior decisions have "clearly established" the principle upon which the plaintiff rests his case. See People of Three Mile Island v. NRC, 747 F.2d 139, 144 (3d Cir. 1984).

In resolving this question, the Third Circuit has adopted a "broad view of what constitutes an established right"

of which a reasonable person should be aware. 791 F.2d at 1103; App. 44a-45a, quoting People of Three Mile Island, supra, 747 F.2d at 144. This formulation requires a plaintiff only to show "some" factual correspondence with prior decisions and a failure to apply "general well-developed" principles in order to defeat state officials' immunity. Ibid. Although purportedly designed to accommodate the competing interests identified in Harlow and to steer clear of requiring executive officials to predict the future course of the law, this formulation resurrects all the dangers which Harlow was intended to eliminate.

The thrust of Harlow is that executive officials, if they are to perform their duties satisfactorily, must

be permitted to press ahead with vigor. To be sure, Harlow does not suggest that officials may violate individual rights with impunity as long as in each instance they are violated in a slightly different way. But neither are the officials to be required to guess at the application of evolving principles of constitutional law. The question is how to deal with situations in the grey areas where there has been some litigation but none which settles the question at hand. This case offers the Court the opportunity to address this troublesome question which has arisen repeatedly in the wake of Harlow.

The Third Circuit's approach leaves executive branch officials in precisely the dilemma which Harlow was designed to avoid--a choice between vigorously pursuing their duties or following a less forceful course because of

the fear that decisions will be extended to prohibit the more desirable course of conduct. As this case well demonstrates, the Court of Appeals' standard requires middle-management personnel to be lawyers and judges, not administrators. This result is contrary to the principles expressed in Harlow and, therefore, calls for this Court's review.

B. In this case, the corrections officials' liability arose from their failure to afford Sourbeer so-called "meaningful periodic reviews" from April to October, 1977. 791 F.2d at 1102, App. 36a-38a. Immunity was denied despite Sourbeer's failure to present persuasive authority that in 1977 the law of prisoner due process clearly required these reviews.

Prior to Hewitt v. Helms, 459 U.S. 460 (1983), this Court had "never held that statutes and regulations governing daily operation of a prison system conferred any [protectible] liberty interest in and of themselves." 459 U.S. at 469. Thus, in 1977, unless Circuit law clearly established Sourbeer's rights, the officials should have been immune. As the dissent below pointed out, immunity was denied here only through extension by implication of three narrow holdings of the Court of Appeals,[4] none of which established clearly the standards to be used in reviewing inmates placed in administrative segregation or in determining when a prisoner should be released from

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[4] Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972); U.S. ex rel. Tyrrell v. Speaker, 471 F.2d 1197 (3d Cir. 1973); Biagiarelli v. Sielaff, 483 F.2d 508 (3d Cir. 1973).

segregation. 791 F.2d at 1109-1110 (Weis, J., dissenting). In short, the law of prisoner due process in 1977 was in a state of flux. 791 F.2d at 1110; App. 85a.

The majority below frankly admitted that it takes a "broad view" of what constitutes an established right of which a reasonable person should be aware. 791 F.2d at 1103; App. 44a-45a. Relying upon its decision in People of Three Mile Island, supra,[5] the court concluded that good-faith immunity was unavailable here despite the factual differences between the decisions cited by Sourbeer and despite the fact that this Court in Hewitt v. Helms, 459 U.S. 460 (1983) categorically rejected the

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[5] The author of the opinion in People of Three Mile Island, Judge Adams, voted for rehearing en banc in the present case. App. 2a.

premise of those decisions. 791 F.2d at 1103-1104, App. 44a-51a. The result is contrary to the clear direction of this Court to afford good-faith immunity unless the law was "clearly established." As the dissent below stated, "Harlow has made crystal clear that the correct standard is 'clearly established'--not 'fairly established' as stated by the district court." 791 F.2d at 1110 (Weis, J., dissenting), App. 88a-89a. The result is particularly inappropriate here because, as the dissent also pointed out, the persons found to be liable are "middle management personnel in a state prison system who are administrators, not lawyers," 791 F.2d at 1109, App. 80a, and the issues under consideration "were not settled until

several years after the challenged conduct here occurred." 791 F.2d at 1110, App. 85a, citing Hewitt v. Helms, supra. This is not a situation where, for example, the defendant is an "individual with legal training who had extensive support personnel to assist in a highly professional evaluation of existing law." 791 F.2d at 1109, App. 80a, (Weis, J., dissenting). Cf. Mitchell v. Forsyth, supra.

The proliferation of § 1983 actions has troubled the courts and commentators alike. See, e.g., Maine v. Thiboutot, 448 U.S. 1, 23-24 (1980) (Powell, J., dissenting); Butz v. Economou, 438 U.S. 478, 526-28 (1978) (Rehnquist, J., dissenting); Aldisert, Judicial Expression of Federal Jurisdiction: A Federal Judge's Thouqhts on Section 1983, Comity and Federal Caseload, 1973 Law & Soc. Ord. 557, 563.

If this Court's holding in Harlow is to achieve the result intended--protection for government officials from liability unless they have violated "clearly established" rights--the standard for good-faith immunity cannot be diluted. The importance of preventing this erosion of the Harlow standard, both to public officials such as petitioners and district courts alike, is apparent. This Court should take the opportunity to correct the Court of Appeals' interpretation of the Harlow standard.

2. THE COURT OF APPEALS' DECISION ON THE GOOD-FAITH IMMUNITY STANDARD CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

The Court of Appeals' decision, adopting a broad view of what constitutes an established constitutional right, is in conflict with decisions of other courts of appeals on the immunity standard. This conflict among the Circuits is one which the Third Circuit itself has recognized. In People of Three Mile Island, supra, the Court of Appeals noted the conflict when it discussed the approaches to the immunity standard that have been taken since Harlow. Indeed, the Court of Appeals expressly rejected the approach of some of the Circuits in favor of a broad view

of construing what is a sufficiently established constitutional right. 747 F.2d at 144; App. 44a-45a.

The Fifth, Sixth, Eighth and District of Columbia Circuits, however, have taken a stricter approach to application of the Harlow standard. See, e.g., Saldana v. Garza, 684 F.2d 1159, 1165 (5th Cir. 1982), cert. denied, 460 U.S. 1012 (1983); Hall v. Medical College of Ohio at Toledo, 742 F.2d 299, 308-10 (6th Cir. 1984), cert. denied, No. 84-5676 (January 7, 1985); Tubbesing v. Arnold, 742 F.2d 401, 406 (8th Cir. 1984); National Black Police Association, Inc. v. Velde, 712 F.2d 569, 576 (D.C. Cir. 1983), cert. denied, 466 U.S. 963 (1984). These cases demonstrate the requirement of strong factual congruence between the prior decisions

and the case under consideration before good-faith immunity will be rejected.

Illustrative of the strict view is the Fifth Circuit's decision in Saldana v. Garza, supra. There, in a § 1983 action alleging arrest without probable cause, the court concluded that a wrongful arrest for a crime whose elements are well-settled does not necessarily mean that the arresting officer violated a right that was "clearly established." 684 F.2d at 1164. The court requires a tight fit between the facts in the case under consideration and the facts of the decisions relied upon for denial of immunity. Id. at 1165. See also National Black Police Association, Inc., supra, 712 F.2d at 576 (defendants did not violate clearly

established rights under Title VI of the Civil Rights Act of 1964 although they did not necessarily comply with the statute).

In contrast, the court below has formulated an immunity standard that requires only "some" factual correspondence with prior decisions and a failure to apply "general well-developed legal principles."[6] The court below concluded that if the standard "is to have any meaning," factually distinguishable cases nevertheless should place officials on notice even where, as here, those cases subsequently have been repu-

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[6] The First and Eleventh Circuits apparently are in accord with the Third Circuit on its liberal construction of the Harlow standard. Blackburn v. Snow, 771 F.2d 556, 569-70 (1st Cir. 1985); Harden v. Adams, 760 F.2d 1158 (11th Cir.), rehearing denied, 767 F.2d 938 (11th Cir. 1985), cert. denied sub nom. Grimmer v. Harden, No. 85-630 (December 2, 1985).

diated by this Court after the underlying events in question. 791 F.2d at 1103-04, App. 50a-51a.

That confusion is present among the Circuits in applying Harlow v. Fitzgerald is apparent. The conflict among the Circuits can be resolved, and the Court can harmonize the lower courts' reading of Harlow v. Fitzgerald, by granting this petition for writ of certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Court of Appeals for the Third Circuit and, upon review, the decision should be reversed with directions to enter judgment for petitioners.

Respectfully submitted,

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APPENDIX

AMENDED ORDER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-5237 and 85-5273

SOURBEER, GREGORY S.
Appellant in No. 85-5273

v.

ROBINSON, WILLIAM, Commissioner of the Bureau of Corrections, State of PA; PATTON ERNEST S., Superintendent of S.C.I. at Camp Hill; MARKS, RONALD Deputy Superintendent of Security of S.C.I. at Camp Hill; BELL, HARVEY, Deputy Superintendent of Treatment of S.C.I. at Camp Hill; and HARRISON, WILLIAM, Classification & Treatment Supervisor of S.C.I. at Camp Hill; Individually and in their official capacity

PATTON, MARKS, BELL & HARRISON,
Appellants in NO. 85-5237

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, Circuit Judges.

The petition for rehearing filed by Patton, Marks, Bell and Harrison, appellants in No. 85-5237, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Adams, Judge Hunter, Judge Weis, and Judge Garth would grant the petition for rehearing in banc.

BY THE COURT,

/s/ A. LEON HIGGINBOTHAM, JR.
Circuit Judge

DATED: June 19, 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GREGORY S. SOURBEER, Appellee/Cross-Appellant	:	
v.	:	Nos. 85-5237, 85-5273
WILLIAM B. ROBINSON, et al.,	:	
ERNEST S. PATTON, RONALD J. MARKS, J. HARVEY BELL, WILLIAM HARRISON, Appellants/Cross-Appellees	:	

PETITION FOR REHEARING IN BANC

Appellants/Cross-Appellees (hereinafter "appellants"), by their counsel, hereby petition the Court, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, for rehearing before the court in banc. In support of this petition, appellants state the following:

1. This is an appeal from a final order of the District Court for the Middle District of Pennsylvania in which the court awarded compensatory damages in favor of a state prison inmate (Sourbeer) whom the court found had been denied due process in 1977 when state corrections officials negligently reviewed his status in administrative segregation.

2. On May 28, 1986, a panel of this Court ruled that Sourbeer's due process rights were violated in 1977 and declined to accord appellants qualified good-faith immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982). Slip op. at 17-20. Judge Weis, in dissent, would have reversed the district court and entered judgment for appellants based on Harlow immunity. Slip. op. at 30-36.

3. The Supreme Court clearly has required that the Harlow immunity standard be scrupulously applied; it repeatedly has emphasized that the law must be "clearly established" in order to defeat public officials' immunity from damages. See Mitchell v. Forsyth, ____ U.S. ____, 105 S.Ct. 2806, 2820 (1985); Davis V. Scherer, ___ U.S. ___, 104 S.Ct. 3012, 3018 (1984).

4. While acknowledging the mandate of Harlow v. Fitzgerald, the panel majority nevertheless applied a "broad view" of immunity, slip op. at 17, relying upon the decision in People of Three Mile Island v. NRC, 747 F.2d 139 (3d Cir. 1984).

5. As Judge Weis noted in dissent, the majority declined to find immunity despite Sourbeer's failure to

present persuasive authority to establish that his right to "meaningful periodic reviews" in administrative segregation was clearly established in 1977.

6. In abrogating appellants' immunity, the majority extended by implication the narrow holding of three decisions of this Court--Biagiarelli v. Sielaff, 483 F.2d 508 (1973); U.S. ex rel. Tyrrell v. Speaker, 471 F.2d 1197 (1973); Gray v. Creamer, 465 F.2d 179 (1972)--and thereby required non-legally trained laypersons to foresee the extension, rather than recognizing, as did the dissent, that the standards for review of prisoners in segregation were not established, at the earliest, until six years after Sourbeer's segregation. See Hewitt v. Helms, 459 U.S. 460 (1983); Mims v. Shapp, 744 F.2d 946

(3rd Cir. 1984); Drayton v. Robinson, 419 F.2d 1214 (3d Cir. 1983).

7. If denial of immunity in this case requires such an extension of holdings of this Court, the panel misapprehended the Court's direction in People of Three Mile Island v. NRC.

8. If extension of the Court's holdings is consistent with People of Three Mile Island v. NRC, such a "broad view" of immunity, slip op. at 17, represents an unjustifiably expansive interpretation of Harlow v. Fitzgerald and one which is contrary to the Supreme Court's direction in Mitchell v. Forsyth and Davis v. Scherer.

WHEREFORE, appellants respectfully request that the Court grant this petition for rehearing in banc.

Respectfully submitted,

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BY: /s/
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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GREGORY S. SOURBEER, Appellee/Cross-Appellant	:	
v.	:	Nos. 85-5237 85-5273
WILLIAM B. ROBINSON, et al.,	:	
ERNEST S. PATTON, RONALD J. MARKS, J. HARVEY BELL, WILLIAM HARRISON, Appellants/Cross-Appellees	:	

STATEMENT FOR REHEARING IN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the Supreme Court of the United States, to-wit, the panel's decision is contrary to the decisions of the Supreme Court in Mitchell v. Forsyth, ___ U.S. ___, 105

S.Ct. 2806 (1985); Davis v. Scherer, ___ U.S. ___, 104 S.Ct. 3012 (1984); Harlow v. Fitzgerald, 475 U.S. 800 (1982).

/s/
GREGORY R. NEUHAUSER
Senior Deputy Attorney General

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-5237 and 85-5273

SOURBEER, GREGORY S.
Appellant in No. 85-5273

v.

ROBINSON, WILLIAM, Commissioner of the Bureau of Corrections, State of PA; PATTON ERNEST S., Superintendent of S.C.I. at Camp Hill; MARKS, RONALD Deputy Superintendent of Security of S.C.I. at Camp Hill; BELL, HARVEY, Deputy Superintendent of Treatment of S.C.I. at Camp Hill; and HARRISON, WILLIAM, Classification & Treatment Supervisor of S.C.I. at Camp Hill; Individually and in their official capacity

PATTON, MARKS, BELL & HARRISON,
Appellants in NO. 85-5237

On Appeal from the United States District Court for the Middle District of Pennsylvania
(D.C. Civil No. 79-0748)

Argued: January 8, 1986
Before: WEIS, HIGGINBOTHAM and BECKER, Circuit Judges.

(Filed May 28, 1986)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., Circuit Judge.

This is an appeal from a final judgment of the district court in an action brought by a Pennsylvania prisoner,

Gregory S. Sourbeer, under 42 U.S.C. §1983. Ernest S. Patton, Ronald Marks, Harvey Bell, and William Harrison ("the appellant officers") were found liable for $1,970 in damages for violating Sourbeer's due process rights. Sourbeer cross-appeals from the denial of certain other claims. For the reasons that follow, we will affirm in part, reverse in part, and remand for further proceedings.

I.

On October 4, 1976, Sourbeer was convicted, in the Court of Common Pleas of Lancaster County, Pennsylvania, of murdering his mother. Though still unsentenced, he was transferred from the Lancaster County jail to the State Correctional Institution at Camp Hill ("SCI-Camp Hill") on October 13, 1976. At that time he was fifteen years old. The Lancaster County authorities asked

to have Sourbeer transferred because they viewed him as a security risk due to his age and the nature of his offense, and because they felt he could receive proper supervision at SCI-Camp Hill.

Upon his arrival at SCI-Camp Hill, Sourbeer was classified as an H.V.A. ("Hold for Various Authorities") prisoner because of his unsentenced status. From October 13, 1976 until October 27, 1977, when he was returned to Lancaster County for sentencing, Sourbeer was housed in the Restricted Housing Unit ("R.H.U.") at SCI-Camp Hill in "administrative custody" status. The R.H.U. is a separate wing that houses inmates who are disciplined for misconduct or who are segregated from the general population for administrative reasons. It is the most secure housing area at SCI-Camp Hill.

During his confinement in administrative custody, Sourbeer was denied entertainment and recreational privileges, required to eat all his meals in his cell, permitted only one hour of exercise outside his cell per day, Monday through Friday, and denied regular visiting privileges (though, on eight separate occasions, Sourbeer had visits form relatives and attorneys). He was not permitted to attend religious services in the prison chapel, use the prison library, or participate in educational and vocational training programs. Sourbeer was permitted to designate a spiritual advisor who could make unlimited visits, but he did not do so. During his confinement in administrative custody, Sourbeer never received a complete psychological or psychiatric examination, nor was he ever charged with any misconduct.

After being sentenced in Lancaster County, Sourbeer was returned to SCI-Camp Hill and, on December 8, 1977, placed in general population. During 1978, while in general population, Sourbeer attended religious services five times.

Throughout the period of Sourbeer's confinement in administrative custody, regulations were in effect in Pennsylvania that established procedures and substantive standards governing the use of restrictive housing in state correctional institutions and regional correctional facilities. The Supreme Court of the United States had occasion to consider these regulations in Hewitt v. Helms, 459 U.S. 460 (1983), and held that they created a liberty interest in general population status that was protected by the Due Process Clause of the

fourteenth amendment. ("[W]e are persuaded that the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest." 459 U.S. at 472.) For convenience, we shall refer to these regulations as Administrative Directive 801.[1]

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[1]The regulations, in effect in somewhat varying forms from November 1, 1972 until February 18, 1984, were the product of formal rulemaking procedures under the Commonwealth Documents Law ("CDL"), 45 Pa. Cons. Stat. Ann. §§ 1201-1208(Purdon Supp. 1985) and were codified at 37 Pa. Admin. Code chap. 95. They were disseminated within the Bureau of Corrections in the form of Administrative Directive 801, which differed from the codified regulations only in the manner sections and subsections were numbered. The relevant provisions of Administrative Directive 801 during the period of Sourbeer's confinement appear as an appendix to this opinion.

Under the Directive, administrative custody was for prisoners requiring closer supervision or protection than is provided in general population, and for temporary assignment pending further classification. The Directive established, for each institution, a Program Review Committee ("P.R.C.") to oversee restrictive housing cases. Appellant officers Bell, Marks, and Harrison were, at one time or another, members of the P.R.C. that reviewed Sourbeer's case. The P.R.C. was required to conduct an in-person interview with each inmate in administrative custody at least once every thirty days. Appellant Patton, as Superintendent of SCI-Camp Hill, was responsible for reviewing the P.R.C.'s decisions.

Apart from the Directive, during the period relevant to this case, the Commissioner of Corrections promulgated administrative memoranda establishing policies for H.V.A. prisoners. The policy in effect when Sourbeer arrived at SCI-Camp Hill provided: "Although it may be desirable and necessary to segregate H.V.A. cases, there is no legal requirement to keep H.V.A. Cases physically separated, when programmatic considerations warrant housing with sentenced inmates, this is permissible."

On January 7, 1977, the Commissioner issued a memorandum revising this policy. It stated:

> Generally, H.V.A. cases shall be assigned to Administrative Custody. Exceptions are: 1) Medical cases requiring hospital or infirmary placement, 2) Disciplinary cases from the county or as a result of misconduct who require disciplinary custody. The institution shall determine the level of Administrative or Disciplinary custody (close or maximum) based on the individual circumstances on a case by case basis....H.V.A. cases are excluded from program participation and work assignments. They are limited to the routine activities of the Administrative Custody Unit.

On April 7, 1977, a new memorandum on H.V.A. cases was issued. This one stated that such inmates should be initially placed in administrative custody, pending a hearing to be held in accordance with Administrative Directive 801.

The district court found that the P.R.C. reviewed Sourbeer's case on October 14, 1976, one day after his placement in the R.H.U. Sourbeer was not present on that occasion, and he was not afforded an in-person interview until November 17, 1976. At that time the P.R.C. gave the following as its reasons for continuing him in administrative custody:

> Subject is here from the Lancaster County Prison for Administrative reasons. He is awaiting trial on a murder charge. We will continue subject in A.C. as we get to know him and he adjusts to the institution.

On December 15, 1976, Sourbeer was again seen by the P.R.C. and continued in administrative custody. The reason given was as follows:

> Subject is here from Lancaster County & charged with murder. He is in need of close supervision & structure at this time. We will continue him in A.C. & work with him in the hopes he can be placed in general population.

Subsequent monthly reviews produced the following statements of reasons for keeping Sourbeer in administrative custody:

> Subject is a transfer from Lancaster County for security reasons. He remains in A.C. for his own protection. [January 12, 1977]

> H.V.A. case who has been charged with murder. Due to his status must remain in A.C. Status. Currently under hospital care. [February 16, 1977]

> Mr. Sourbeer was interviewed today. No progress has been made on the litigation or his bail status. [March 16, 1977]

> Subject is 16 years old & from Lancaster County awaiting trial for murder. He was transferred here from the county for security reasons & his age. Continue in A.C. for his protection & the fact he is unsentenced. [April 13, 1977]

Subject is here from Lancaster County & is awaiting trial for murder. Subject is 16 years old & has special programs needs at this time that require an administrative custody setting. [June 8, 1977]

Subject is a transfer from Lancaster County for protective custody & is awaiting trial for murder. He will remain in A.C. for programmatic reasons. [July 6, 1977]

H.V.A. from Lancaster Co. Murder charge pending. Expects court action in September. Continue on present status due to nature of the case. No problems indicated. Remain in A.C. [August 10, 1977]

Subject is an H.V.A. from Lancaster County & awaiting trial for murder. In light of his H.V.A. status & the murder charge his program needs can best be suited in A.C. Other: Security. [September 13, 1977]

H.V.A. - from Lancaster County. Murder charge pending. Subject is an H.V.A. from Lancaster County. He has been found guilty of murder & not sentenced. He is awaiting disposition of his appeal. In light of his H.V.A. status & charge his programmatic needs can best be served in A.C. [October 12, 1977]

Sourbeer filed a §1983 complaint on June 14, 1979, alleging, principally, that his confinement in administrative custody violated his rights to due process under the fourteenth amendment (both in the initial placement and the failure to provide meaningful periodic reviews) and to the free exercise of religion under the first amendment. Stipulations of undisputed facts and cross-motions for summary judgment were filed. On April 2, 1984, the district court denied the cross-motions for summary judgment, holding as a matter of law that defendants were not entitled to qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982), and finding that further factual development was necessary to determine the actual basis for Sourbeer's confinement. A bench trial was held on January 22,

1985. Sourbeer testified on his own behalf, and presented an expert psychiatric witness. Appellant officers Marks and Patton testified for the defense, along with their own psychiatric expert.

The district court handed down its findings of fact and conclusions of law on March 20, 1985. The court held that Sourbeer's due process rights were not violated by his initial confinement in administrative custody for 35 days prior to any hearing, and that the reviews conducted in November and December of 1976 comported with the requirements of due process. It further held that his confinement between January 7 and April 7, 1977 could not be subjected to due process scrutiny because the H.V.A. policy then in effect did not permit H.V.A. inmates to be placed in general population, thereby vitiating Sourbeer's

liberty interest. The court did, however, hold that Sourbeer's due process rights were violated by his confinement during the period from the P.R.C. review on April 31, 1977 until his release from administrative custody on October 27, 1977, because "over time reasons which would have justified Sourbeer's early detention in administrative custody were applied in a rote fashion in later reviews when experience should have led officials to let Sourbeer into the general population." The court awarded Sourbeer $1,970.00 in damages, representing $10 for each day of unlawful confinement.[2] The district court rejected Sourbeer's free exercise claim, finding that his complaint was not credible or sincere.

II.

The appellant officers contend that the district court erred in finding

a due process violation and that, in any event, they are entitled to qualified immunity from liability. In his cross-appeal, Sourbeer contends that the district court erred in finding no due process violation in his initial confinement, that he had no liberty interest between January 7 and April 7, 1977, and that his free exercise rights were not violated. He also claims that $10 per day is not adequate compensation for the period of unlawful confinement. In the sections that follow, we shall address each of these contentions.

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[2]Commissioner of Corrections Robinson was found not liable because, the district court held, he performed no actionable conduct. Sourbeer does not dispute this finding in this appeal.

A. The Initial Placement in Administrative Custody

Sourbeer was convicted of the first degree murder of his mother on October 4, 1976, and transferred from the Lancaster County Jail to SCI-Camp Hill on October 13. The Lancaster authorities viewed him as a security risk because of his age (15) and the nature of his crime. He was classified H.V.A. because of his unsentenced status, and placed in administrative custody. The following day, the P.R.C. reviewed Sourbeer's case and determined that he should remain in administrative custody. Sourbeer was not present at that review. His first in-person review occurred on November 17, 1976, 35 days after being placed in administrative custody. Sourbeer contends that this delay violated the due process requirement that the "proceeding must

occur within a reasonable time following an inmate's transfer...." Hewitt v. Helms, 459 U.S. at 476 n.8.

The district court rejected this contention, stating: "Prison officials who had no personal knowledge of an inmate transferred from a county prison after his conviction of murder, could constitutionally segregate that inmate for a period of time in the interest of prison security especially when the transferring county authorities did so because they considered the inmate a security risk who should be placed in maximum security." Sourbeer cannot cite any cases specifically supporting his contention that this was error, noting only that in Hewitt v. Helms, under the rather different circumstances of a prisoner awaiting a disciplinary proceeding, a hearing five

days after the placement in administrative custody was deemed timely. This, of course, does not necessarily mean that 35 days is unreasonable in the instant case.

Though it is a close question, we think that under the specific circumstances of this case, as noted by the district court, the 35-day wait did not rise to the level of a due process violation.

B. Sourbeer's Liberty Interest January 7 to April 7, 1977

The district court did not subject Sourbeer's confinement in administrative custody during the period from January 7 to April 7, 1977 to due process scrutiny because it concluded that a memorandum from Corrections Commissioner Robinson, in effect during this period, effectively extinguished any liberty interest

that H.V.A. prisoners had in general population status. We hold that it was error to conclude that Sourbeer had no protectible liberty interest during this period, and accordingly will reverse that part of the district court's judgment, and remand for further consideration of whether Sourbeer was afforded due process during that period.

Under Hewitt v. Helms, it is clear that Administrative Directive 801 gave Pennsylvania prisoners a protected liberty interest in general population status. The district court's holding that Sourbeer had no protected liberty interest between January 7 and April 7, 1977, even though Administrative Directive 801 was in effect, was based on the existence of a second "regulation"--really a memorandum from Commissioner of Corrections Robinson dealing with H.V.A.

prisoners. It provided that, except in medical or disciplinary cases, H.V.A. prisoners were to be kept in administrative custody, leading the district court to conclude that Sourbeer had no liberty interest in general population status while this memorandum was in effect.

The district court's conclusion depends on the validity of one of two premises: (1) Administrative Directive 801 did not, by its own force, create a liberty interest applicable to H.V.A. prisoners, but did so only when buttressed by a separate H.V.A. memorandum to that effect; or (2) the Directive did create such an interest, but could be unilaterally abrogated by memoranda issued by the Commissioner. Neither of those premises is valid. In Drayton v. Robinson, 719 F.2d 1214 (3d Cir. 1983) this court had occasion to consider the

interrelation of Administrative Directive 801 and the H.V.A. memorandum, and held that the Directive by its terms applies to H.V.A. prisoners, giving them a protectible liberty interest in population status regardless of the contents of the H.V.A. memorandum. 719 F.2d at 1218. Thus, unless the Commissioner of Corrections can take away--by administrative fiat--a liberty interest previously created through duly promulgated, published, and codified regulations, Sourbeer had a protectible liberty interest throughout the period of his segregation. We think it is axiomatic that, except perhaps in exigent circumstances not present here,

the Commissioner has no such power.[3] Precise procedures for the promulgation and amendment of all administrative regulations appear at 45 Pa. Cons. Stat. Ann. §§1201-1208 (Purdon Supp. 1985). They constitute a "rule of recognition," see generally H.L.A. Hart, The Concept of Law 97-107 (1961), for valid regulations. It appears that these procedures were followed by the Commissioner with respect to Administrative Directive 801,[4] but not with respect to the

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[3]We recognize that the Commissioner might simply have viewed his memorandum as a permissible interpretation of Administrative Directive 801. Under our decision in Drayton, however, it is clear that his interpretation was invalid.

[4]The initial publication of the Directive was accompanied by a recitation of steps taken in compliance with the CDL. See 2 Pa. Admin. Bull. 1771 (1972).

H.V.A. memorandum. Thus, the H.V.A. memorandum cannot be accorded a status under Pennsylvania law superior, or even equal, to that of Administrative Directive 801.[5] We conclude that Sourbeer did have a protected liberty interest during the period January 7 to April 7, 1977. It will be left for the district court to determine whether Sourbeer was deprived of this interest without due process of law.

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[5]The appellant officers have cited former 71 Pa. Cons. Stat. Ann. §306 (repealed 1984) as a fount of authority for the H.V.A. memoranda. That provision authorized the Commissioner, "(s)ubject to the approval of the Department of Justice, to make such by-laws, rules and regulations for the management of the institution." We need not decide here to what extent this permits the Commissioner to exercise rule-making authority through procedures other than those prescribed by the CDL, cf. Lowery v. Cuyler, 521 F.Supp. 430 (E.D. Pa. 1981), for here we deal only with the problem of priority where the Commissioner's informal memoranda conflict with published regulations.

C. The Due Process Violation

The district court held that Sourbeer's confinement in administrative custody between April 13 and October 27, 1977 violated his due process rights, because, it found, "over time reasons which would have justified Sourbeer's early detention in administrative custody were applied in a rote fashion in later reviews when experience should have led officials to let Sourbeer into the general population." The appellant officers contend that, under the guise of finding a failure to provide due process, the district court has in fact substituted its substantive judgment for the judgment of prison officials. They argue that constitutionally adequate procedures were followed, and that greater judicial deference is due their professional judgment. Though we agree

with their assertion that considerable deference must be given to the judgment of prison officials, see Bell v. Wolfish, 441 U.S. 520, 547 (1979), we believe that they mischaracterize the district court's holding in this case--the district court did in fact find liability because of a defect in the "process," as opposed to the "substance," of their decisionmaking.

There would seem to be no question under Hewitt v. Helms that the informal, monthly review procedures established by Administrative Directive 801 were facially adequate to protect the prisoners' liberty interest in remaining in general population. Nor is there any contention that the appellant officers did not follow the letter of these regulations during the period for which

the district court found a due process violation. As we understand the district court's opinion, it found that due process was violated because the monthly reviews, from April 1977 on, were perfunctory, thus denying Sourbeer the most fundamental right of due process: a meaningful opportunity to be heard. See Parratt v. Taylor, 451 U.S. 527, 540 (1981). We do not share the concern of the appellant officers over the fact that the district court examined the reasons given for Sourbeer's continued confinement in administrative custody. As this court has noted previously, "[t]o insure that periodic review does not become simply a sham, the content and substance of that review must be scrutinized under the illumination of the fourteenth amendment." Mims v. Shapp, 744 F.2d 946, 954

(3d Cir. 1984); see also Hewitt v. Helms, 459 U.S. at 477 n.9.

The finding that the purported justifications were simply being applied in a rote fashion should not be disturbed unless clearly erroneous. There appears to be adequate support for this finding. The district court stated:

> Defendant Marks voiced some concern at trial about plaintiff's withdrawn, standoffish, uncommunicative behavior and "bad attitude," but plaintiff was not issued any misconducts during his stay in administrative custody. In this light, these general observations of Sourbeer's personality cannot justify his segregation. Significantly, while there was some concern about Sourbeer's personality, he was not given any psychiatric or psychological evaluations during his stay at Camp Hill. Finally, and more importantly, Sourbeer's segregated position seems to have

> resulted simply from his HVA status. Despite the revised HVA memo issued on April 7, 1977, one-half of the periodic reviews from April 24, 1977 onward noted plaintiff's HVA or unsentenced status as a reason for keeping him in administrative custody. Defendant Marks admitted that this was one reason for plaintiff's segregation. Despite the prison officials' stated concern about plaintiffs "programmatic needs," among other things, shortly after Sourbeer was sentenced by the Lancaster County Court he was moved into the general population.

App. at 190a (citations omitted).

We find it significant that instead of calling as witnesses persons who had professional dealings or day-to-day contact with Sourbeer, only appellants Patton and Marks, who had only limited or indirect contact with Sourbeer and lacked professional training, testified. Had Bell and Harrison, who knew Sourbeer and had training in counseling

and psychology, testified, the officers' case might have been more compelling. It is also interesting to note that the P.R.C. reports fairly consistently misstated Sourbeer's status as awaiting trial for murder, when he in fact was convicted but unsentenced. This careless repeated error is additional support for the district court's finding that Sourbeer was not afforded meaningful process.

D. The Free Exercise Claim

Sourbeer contends that his right to freely exercise his religion was abridged during his stay in administrative custody because he was not permitted to attend congregational worship services. The district court rejected this claim on two grounds. First, the district court held that the

prohibition against administrative custody inmates attending worship services served a valid security purpose, and was therefore constitutional under St. Claire v. Cuyler, 634 F.2d 109 (3d Cir.), rehearing denied, 643 F.2d 103 (3d Cir. 1980).[6] Alternatively, the court found that the free exercise complaint was "not credible or sincere."

A sincere religious belief is a prerequisite to any free exercise claim. See Africa v. Commonwealth of Pennsylvania, 662 F.2d 1025, 1030 (3d Cir. 1981), cert. denied, 456 U.S. 908

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[6]Subsequent to the district court's decision, St. Claire was overruled by Shabazz v. O'Lone, 782 F.2d 416 (3d Cir. 1986)(en banc), which announced a new standard for evaluating prisoners' free exercise claims. Because we affirm on the alternative ground, we need not consider the effect of Shabazz on this case.

(1982). Unless the district court's finding of insincerity is clearly erroneous, we need go no further. Sourbeer argues that the finding was based on an impermissible inference from the fact that during 1978, while in general population, he attended services only five times. He cites Cole v. Fulcomer, 588 F.Supp. 772 (M.D.Pa. 1984), reversed on other grounds sub nom, Cole v. Flick, 758 F.2d 124 (3d Cir.), cert. denied, 106 S.Ct. 253 (1985), where the court rejected evidence that a Native American Indian prisoner had not always been religious, and did not observe his religion in every respect, as indicative that his desire to wear his hair at a traditional length was not a sincere religious belief. Though we may agree that courts should not put undue weight on past or unrelated departures from orthodoxy, such is not the case here.

The court below relied on evidence relating to the precise practice at issue --attending worship services-- during the time period immediately after the restriction at issue was lifted. The court also took note that Sourbeer failed to designate a spiritual adviser who could visit with him in the R.H.U., as he would have been permitted. We cannot say the court's finding was clearly erroneous.

E. Qualified Immunity

The appellant prison officers contend that even if they did violate Sourbeer's due process rights, they are entitled to qualified immunity from liability for damages under the rule of Harlow v. Fitzgerald, 457 U.S. 800 (1982). Harlow held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as

their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. In People of Three Mile Island v. NRC, 747 F.2d 139 (3d Cir. 1984), this court adopted a broad view of what constitutes an established right of which a reasonable person would have known, "requiring some but not precise factual correspondence [with precedents] and demanding that officials apply general, well developed legal principles." 747 2d at 144.

The district court found that by the time relevant here, 1976-77, analogous Third Circuit precedents, specifically Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972), United States ex rel. Tyrrell v. Speaker, 471 F.2d 1197 (3d Cir. 1973), and Biagiarelli v. Sielaff, 483 F.2d 508 (3d Cir. 1983), clearly established that

a liberty interest triggering due process rights was involved in administrative custody placements, and that procedural protections comparable to those outlined in Hewitt v. Helms were required. Appellant officers argue that these cases are distinguishable. Thus, we must briefly survey their facts and holdings.

Gray v. Creamer was a suit brought by prisoners who had been involved in publication of a prison newsletter that was shut down by prison officials. They alleged, inter alia, that they had been placed in punitive and administrative segregation without being charged with violations of prison regulations or being given a hearing. 465 F.2d at 183. Though the court did not see fit to state on the basis of the record before it precisely what process was due, it did reverse the dismissal of the

prisoners' suit, holding "that the transfer of a prisoner from the general population to solitary confinement without either notice of the charges or a hearing does not, absent unusual circumstances not evident in the pleadings, meet minimal due process requirements." 465 F.2d at 185 (footnote omitted).

United States ex rel. Tyrrell v. Speaker expanded somewhat on the Gray holding. Tyrrell was classified as a security risk after an escape attempt, and placed in punitive segregation. The court held that such a transfer could be made only after a hearing, on "facts rationally determined." 471 F.2d at 1203.

In Biagiarelli v. Sielaff, the plaintiff prisoner was placed in administrative custody after officials received information that he was involved in an escape conspiracy. The court held that he was entitled to "either written

notice of the basis for his removal from the prison population and an opportunity to rebut the charge, or a hearing." 483 F.2d at 512. The court declined to state a general rule as to when the notice or hearing would have to be provided, stating that it "depended on when the threat to the institution subsided, regardless of whether he was held in punitive or administrative segregation." Id.

The appellant officers attempt to distinguish Gray, Tyrrell, and Biagiarelli on the ground that they did not involve unsentenced inmates such as Sourbeer. They suggest, however, no basis for a reasonable officer to assume that an unsentenced inmate is entitled to less process than sentenced inmates,

and we can think of none.[7] If the People of Three Mile Island standard is to have any meaning, insofar as it requires "some" but not "precise" factual correspondence with precedents and that officials apply general legal principles, then it seems to us that Sour beer's unsentenced status cannot absolve the prison officers from liability.

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[7]It might be argued that because officials are likely to know less about unsentenced inmates than sentenced inmates, a valid distinction may be drawn. Even assuming this is so (and, indeed, we have implicitly recognized such a distinction in allowing 35 days before Sourbeer's first opportunity to be heard), it would not hold true indefinitely. The appellant prison officers had ample opportunity to become acquainted with Sourbeer, had they sought to do so.

The appellant officers further contend that this early line of cases did not put them on notice of Sourbeer's rights because this court relied on a faulty premise ultimately rejected by the Supreme Court in Hewitt v. Helms--i.e., that the "Due Process Clause implicitly creates an interest in being confined to a general population cell, rather than the more austere and restrictive administrative segregation quarters." 459 U.S. at 466-67. They are correct in pointing out that under Hewitt v. Helms, the source of Sourbeer's liberty interest is not the Constitution itself, but rather is Administrative Directive 801, and that earlier Third Circuit opinions to the contrary therefore had a faulty rationale. We do not, however, believe that this means the appellant officers were not on notice of Sourbeer's liberty interest, and his

concomitant right to due process. That right was established in the Gray/Tyrrell/Biagiarelli line of cases and reaffirmed in Hewitt v. Helms. A reasonable official should not fail to respect a person's constitutional rights because the rationale behind the cases establishing those rights may be faulty. Indeed, it is unrealistic to assume that officials are likely even to be aware of the legal reasoning behind applicable precedents. We conclude that Sourbeer's due process rights are clearly established within the meaning of Harlow and People of Three Mile Island, and that the appellant officers are liable to him for damages.[8]

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[8]The dissent argues that prior Third Circuit precedents are distinguishable because they only dealt with

(FOOTNOTE CONTINUED ON NEXT PAGE)

The appellant officers raise one other argument on the immunity issue that is worthy of comment. They point out that the district court found that

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(FOOTNOTE CONTINUED)

initial placements in restrictive housing, not subsequent renewals of such placements. This distinction, which was not proffered by any party, does not suffice to immunize the appellant officers under the People of Three Mile Island test. We see no basis for a reasonable prison officer applying general legal principles to conclude that less process is due to prisoner facing a second or third "term" in restrictive housing than is due upon initial placement. We also think it is clear, contrary to the dissent's suggestion, that the appellant officers' lack of legal training and reliance on the views of the Commissioner do not make them immune from liability. See Malley v. Briggs, ____U.S.____, 106 S.Ct. 1092 (1986)(police officer who lacks objectively reasonable basis for applying for arrest warrant liable despite magistrate's approval of application).

their failure to give Sourbeer adequate process was not intentional, but the result of gross negligence in the conduct of the periodic reviews. They argue that it was not established until Davidson v. O'Lone, 752 F.2d 817 (3d Cir. 1984)(in banc), aff'd sub nom. Davidson v. Cannon, ____U.S.____, 106 S.Ct. 668 (1986), that a cause of action lies under the Civil Rights Act for grossly negligent conduct. Thus, they could not reasonably have been expected to know in 1977 that they would be held to such a high standard of care. We need not decide whether this is true,[9] because we believe that the district

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[9]Indeed, even in Davidson, the reference to gross negligence was dicta (the case involved negligence) and was not joined by a majority of the court. 752 F.2d at 828 & 828 n.8.

court's gross negligence finding was superfluous to the resolution of the due process issue.

Cases such as Davidson, dealing with a state of mind requirement for § 1983 due process actions, relate only to the highly unusual circumstance where the deprivation of life, liberty, or property the case is predicated upon was not intentional, as opposed to where the failure to provide adequate process was not intentional. For example, in Davidson prison guards negligently failed to take action to protect one prisoner who was threatened by another, allegedly "depriving" him of a liberty interest in being free of assaults. In the case of Parratt v. Taylor, 451 U.S. 527 (1981), guards negligently lost a prisoner's hobby kit, allegedly "depriving" him of property. In Daniels v. Williams, ____U.S.____, 106 S.Ct. 662

(1986) it was alleged that a correctional deputy had negligently left a pillow on a stairway, causing the plaintiff to slip and thereby "depriving" him of a liberty interest. These cases, it is readily apparent, are of a highly unusual nature -- the defendants had probably not even been aware until after the fact of the "deprivations" that would trigger due process concerns. "To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law." Daniels, 106 S.Ct. at 665 (emphasis added).

Here, in contrast, the keeping of Sourbeer in administrative custody--depriving him of liberty--was itself an intentional act. That being the case, it was not necessary for the district court to make any other state of mind

finding. We know of no authority for the proposition that an intentional deprivation of life, liberty or property does not give rise to a due process violation because the failure to provide due process was without fault. If that were the rule, there would be no due process violation where an official who deliberately deprives a person of his life, liberty or property carefully follows established state procedures that are later found to be constitutionally inadequate, because the official would be without fault.[10] Clearly, that is not the law. See, e.g.,

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[10]In such a situation the officer may be entitled to Harlow immunity, based on the objective reasonableness of the conduct, but that does not mean there is no due process violation in the first instance.

Goldberg v. Kelly, 397 U.S. 254 (1970). Here the defendants deliberately deprived Sourbeer of liberty, and failed to provide process that was constitutionally required--it was unnecessary for the district court to determine whether that failure was intentional, grossly negligent, or without fault at all, because there would be a constitutional violation in any event. Our reading of the district court's opinion leads us to believe that the gross negligence finding was actually inserted only for the purpose of determining whether punitive damages were appropriate, not whether there was a violation of due process in the first instance. The district court's finding of gross negligence, therefore, does not alter our Harlow immunity analysis.

F. The Damages Awarded

Sourbeer contends that $10 per day was insufficient to compensate him for the violation of his rights. He does not seem to contend that it was inadequate as a matter of law, or that it resulted from any clearly erroneous finding of fact. Indeed, he specifically declines to suggest an alternative calculation. We see no basis for disturbing the district court's award.

CONCLUSION

For the reasons set forth above, the judgment of the district court will be reversed insofar as it held that Sourbeer had no protected liberty interest between January 7 and April 7, 1977, and remanded for a determination of whether Sourbeer's due process rights were violated by his confinement in administrative custody during that period. It will be affirmed in all other respects. Costs taxed against appellants in No. 85-5237. Each side to bear its own costs in No. 85-5273.

APPENDIX

Excerpts from Administrative Directive 801 (effective June 1, 1974):

III. PROCEDURES

. . .

I. Program Review Committee

1. The Program Review Committee shall be composed of the Deputy Superintendent for Operations, the Deputy Superintendent for Treatment Services and the Director of Treatment. In the absence of one of the foregoing members, the Superintendent shall designate an appropriate substitute.

. . .

4. The Program Review Committee shall re-

view bi-weekly those cases of residents held in Administrative Custody by self-imposed confinement, administrative protective confinement, transfers, etc. Support Teams or counselors (in lieu of Support Teams) shall be responsible for providing the necessary status reports for this Committee to review these cases.

5. The Program Review Committee shall interview in person at least once every 30

days those residents detained in Administrative Custody or the Behavior Adjustment Unit. Residents detained in this status for more than 30 days shall have their cases reported to the Commissioner of Correction, together with the rationale for such status and the particular programs prescribed.

. . . .

V. HOUSING CATEGORIES

The Bureau of Correction shall recognize the following housing

categories for residents within state correctional institutions.

. . . .

B. Administrative Custody - for residents requiring closer supervision or protection than is provided in the general population and for temporary assignment of residents pending further classification.

VI. CARE AND TREATMENT

A. Administrative Custody housing shall be a specified group of cells in a designated section of a cellblock or infirmary.

1. Residents therein shall have all rights and privileges accorded the general population except

for curtailment of freedom to move about the institution and engage in programs with the general population.

2. They shall retain all personal property with them.

3. The Program Review Committee may permit a form of internal work-release from this unit as a gradual process of return to general population status.

. . . .

D. ....The Program Review Committee shall release a resident from Administrative Custody or the Behavior Adjustment Unit as soon as feasible.

Excerpts from Administrative Directive 801 (effective February 12, 1977):

III. PROCEDURES

. . . .

G. Program Review Committee

1. The Program Review Committee shall be composed of the Deputy Superintendent for Operations, the Deputy Superintendent for Treatment Services and the Classification and Treatment Supervisor. In the absence or lack of any of the foregoing members, the Superintendent shall designate an appropriate substitute.

. . .

3. The Program Review Committee shall review weekly those cases of inmates detained in Administrative Custody or Disciplinary Custody and shall decide whether continued custody in those units is appropriate and necessary in each case. This decision will be based upon a review of the counselor's notes and recommendations, additional entries made on the inmate's record regarding his attitude and actions since placement in the restricted housing or since the last weekly review as well as the mis-

conduct which was the basis of the placement for those cases in Disciplinary Custody.

4. The Program Review Committee, as a Committee, shall interview in person at least once every thirty days, those inmates detained in Administrative Custody or Disciplinary Custody. The determination of whether continued confinement is warranted will be based upon a review of the counselor's notes and recommendations, psychological and psychiatric reports when available, recommendations by

other staff and their written observations regarding his attitude and actions and his attitude and actions during the interview. If the inmate is in Disciplinary Custody, the gravity of the misconduct must be considered. When the Program Review Committee determines that continued confinement is warranted, the inmate shall be given a written statement of the decision and its rationale. In cases of inmates detained in this status for more than thirty days,

it shall be reported to the Commissioner of Correction by the Superintendent with his comments as well as those of the Program Review Committee and the rationale for such status and particular programs prescribed shall be stated. All inmates continuously confined in Administrative and Disciplinary Custody for a period of one year shall be given thorough annual psychological and psychiatric examination during this confinement.

. . .

V. RESTRICTED HOUSING CATEGORIES

The Bureau of Correction for purposes of this Administrative Directive shall recognize the following restricted housing categories for inmates within state correctional institutions.

A. Administrative Custody - for inmates requiring closer supervision or protection than is provided in general population and for temporary assignment of inmates pending further classification. Maximum Custody involves housing in the most secure facilities available in the institution and includes the most intensive scrutiny of all matters pertaining to security and the most restrictive regulation of inmate mobility.

Close Custody involves housing in more secure facilities than those used for general population and restricted mobility. The degree of security and restriction of mobility is less than the degree present in maximum custody. Maximum or Close Custody may be designated based on the intensity of supervision and control required.

. . .

VI. CARE AND TREATMENT

A. Administrative Custody housing shall be designated as Close and Maximum and will be specified groups of cells in a designated section or sections

of the institution as the physical plant permits.

1. The purpose of placing an inmate in this unit shall be to maintain the safety of the institution by segregating an individual who poses a threat to other inmates, to staff or to himself, poses an escape risk or needs protection from other inmates. The decision to place an inmate in this custody must comply with III. G.4., IV. B.1., IV. B.3., or IV.B.4. Determination of whether Close or Maximum Administration Custody is necessary will be made by the Program Review Committee.

2. The inmates therein shall have all the rights and privileges accorded to the general population except for freedom to move about the institution, freedom to engage in programs with the general population, the use of civilian clothing, and the use of items specifically found by the Program Review Committee to be a security hazard. The use of personal radios and televisions may be permitted with the express approval of the Program Review Committee. All other personal property which is permitted in general population will be

permitted in Administrative Custody.

3. The inmate requesting the use of an item or to participate in a program permitted in general population not expressly excluded shall initiate such a request through the request slip process to the Program Review Committee who shall respond within one week.

4. The Program Review Committee may permit a limited release program from Close Administrative Custody as a gradual process to return to general population status.

. . . .

C. Inmates in categories A and B, above, shall receive interviews at least weekly by the institution's professional treatment staff. The Program Review Committee shall release an inmate from Administrative Custody or Disciplinary Custody as soon as appropriate.

WEIS, Circuit Judge, dissenting.

For purposes of analysis, the district court and majority have divided the plaintiff's confinement in administrative segregation into three periods. The first was from October 13, 1976 to January 7, 1977. Because the initial assignment to segregation was based on security reasons and was intended to give prison officials an opportunity to

become familiar with plaintiff, the district court found no liability. The majority affirms, noting that the original confinement "did not rise to the level of a due process violation."

The second interval began on January 7, 1977, when the Commissioner issued a memorandum purporting to modify prison policy, and continued until April 7, 1977 when another memorandum was distributed. The district court concluded that during this interval the defendants' decision to keep plaintiff in segregation did not infringe his constitutional rights. The majority, however, disagrees and remands for a determination of whether Sourbeer was deprived of a liberty interest without due process.

The third time span ran from April 7 to October 13, 1977. The district court found that the plaintiff's segregation

during that interval resulted in a due process violation. Liability was not based on intentional misconduct but rather on the grossly negligent manner in which the defendants conducted the plaintiff's periodic reviews.

Although it had made a pretrial finding that defendants were not entitled to qualified immunity based on the record at that point, the district court did not reconsider that ruling in light of the factual findings after trial. Rather, on determining a violation had occurred, the district court simply awarded damages. The majority affirms the damage award on the ground that the district court's finding of perfunctory reviews by defendants was not clearly erroneous.

The majority and I agree with the district court's determination that the

initial placement in administrative custody did not offend the Constitution, and that no damages are due for that period. Because I believe that defendants are entitled to qualified immunity, however I would deny damages for the second and third stages of confinement as well.

Harlow v. Fitzgerald, 457 U.S. 800 (1982), created a new objective standard for the application of qualified immunity. The purpose of the revised standard is to spare public officials from the expense, both in time and money, in defending against insubstantial damage claims. The shield of immunity applies if the law was unsettled when the conduct occurred. As the Supreme Court phrased it, "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate

subsequent legal developments." Id. at 818.

If there were any doubt about the standard after Harlow, it was set to rest in Mitchell v. Forsyth, 105 S.Ct. 2806 (1985). The district court was aware of Harlow and cited it in a pre-trial memorandum, but Forsyth was decided after the district court entered judgment. In Forsyth, the Court stated that "Hindsight-based reasoning on immunity issues is precisely what Harlow rejected. The decisive factor is not that [the defendants'] position turned out to be incorrect but that the question was open at the time of the act." 105 S.Ct. at 2820. The Court repeatedly emphasized that the law must be "clearly established" and found that the legality of a challenged wiretap which had occurred in 1970 was an "open"

question at that time. The Supreme Court rejected the district court's conclusion that the Attorney General was liable because "he gambled and lost on the resolution of [that] question."

Forsyth is significant because it granted immunity to an individual with legal training who had extensive support personnel to assist in a highly professional evaluation of existing law. The position and resources of an Attorney General contrast sharply with those of middle management personnel in a state prison system who are administrators, not lawyers.

In Davis v. Scherer, 104 S.Ct. 3012, 3018 (1984), the Supreme Court ruled in favor of a qualified immunity claim even though the plaintiff proved that he had been discharged from state employment

without constitutionally adequate notice and hearing. The Court stated, "Even defendants who violated constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard."

Analysis of whether the rights that plaintiff alleges here were clearly established in 1977 is hampered by the generality of the district court's findings. In its pretrial opinion denying immunity, the court referred to "formal hearings to determine housing categories." In a memorandum denying reconsideration of that ruling, the court relied on Biagiarelli v. Sielaff, 483 F.2d 508 (3d Cir. 1973); United States ex rel. Tyrrell v. Speaker, 471 F.2d 1197 (3d

Cir. 1973); and Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972). The court stated, "The clear import of those cases [particularly Tyrrell] is that prison authorities may not act arbitrarily in transferring a prisoner from the general prison population to segregation." The district court believed this restriction was clearly established at the time the challenged acts occurred. However, the initial transfer to administrative custody, the issue which dominated the district court concern at pretrial, is not the problem here.

The defendants' liability here arises from the plaintiff's right to have "meaningful periodic reviews" after assignment to administrative custody. Plaintiff has not presented persuasive authority to establish that this was a clearly established right, nor to estab-

lish a useable definition of "meaningful" in constitutional terms.

It is undisputed that plaintiff was provided periodic reviews. The district court found that plaintiff was not kept in confinement because of his "bad attitude", but apparently was retained because he was unsentenced. Some of the periodic reports noted that plaintiff was 16 years old and required segregation for his own protection. Monthly periodic reviews, "meaningful" or otherwise, are not necessary to determine whether an inmate has been sentenced or to detect a change in age.

The majority and the district court would extend by implication the holdings in Biagiarelli, Tyrrell, and Gray to articulate the procedures required for the duration of segregated custody. Even

if that reasoning suffices to establish a constitutional violation, it falls far short of the standard required to vitiate immunity. Those three cases did not establish clearly, or otherwise, the standards to be used in conducting periodic reviews or in determining when a prisoner should be released from administrative segregation.

Biagiarelli and Gray are limited to the initial transfer to administrative custody. They hold that a prisoner must be provided with notice and hearing before being transferred from the general population to segregated confinement. Those cases are inapposite because they do not discuss what process is due after the initial transfer.

Tyrrell is somewhat closer factually to the case at hand but only to the extent that there the prisoner was unsen-

tenced when he was placed in punitive (not administrative) segregation. Nonetheless the court's opinion focused on the due process requirements for the initial transfer, not events that occurred thereafter.

Consequently, in 1977 there was a gap in decisional law as to the liberty interests and constitutional rights of unsentenced prisoners during the period of their confinement in administrative segregation. Those issues were not settled until several years after the challenged conduct here occurred. See Hewitt v. Helms, 459 U.S. 460 (1983); Mims v. Shapp, 744 F.2d 946, 954 (3d Cir. 1984); Drayton v. Robinson, 719 F.2d 1214 (3d Cir. 1983).

That the rights of these inmates were in flux in 1977 is apparent from an examination of a state regulation and a memorandum issued by the Commissioner-of

Corrections. Administrative Directive 801 governs the placement of prisoners in administrative as well as disciplinary custody. A fair reading of that regulation shows that it provided only for the transfer of inmates from the general population to segregation. No provisions spoke to the treatment of unsentenced detainees after they were placed in administrative custody.

In an effort to interpret 801 and to address the needs of unsentenced prisoners, the Commissioner issued a memorandum in 1977 which purported to establish guidelines for the handling of these special detainees. The memorandum instructed the superintendents and wardens that all unsentenced inmates, except those who required special medical attention, were to be placed in "administrative custody pending a formal hearing to

determine appropriate housing." Since the plaintiff's hearing had already taken place, the memorandum did not affect his situation.

Defendants were subordinates of the Commissioner, and nothing in the record impugns their reliance on the memorandum and regulation for guidance in carrying out their duties. The district court specifically stated that it did not doubt the defendants' sincerity in conducting the periodic reviews and that defendants "did not act with evil motive or intent. There was no intentional misconduct, or reckless indifference here."

In his pretrial memorandum denying immunity, the district judge stated that he did not see "anything in the language of any of those cases [the Gray trilogy]

to indicate that the court of appeals intended they be read so narrowly as to eliminate due process" for unsentenced inmates. He continued, "We believe that the cases cited fairly established that some process was due plaintiff and placed defendants on notice of that fact."

It is critical to the outcome here that the references were only to the initial transfer into administrative segregation. At no point in that memorandum did the district court discuss or articulate due process rights of a prisoner after administrative custody began, let alone determine that they were clearly established.

Even in the context of initial transfer the language used by the district court indicates error. Harlow has made crystal clear that the correct

standard is "clearly established"--not "fairly established" as stated by the district court. There is a substantial difference in the emphasis between "fairly" and "clearly." The former allows some "play in the joints," but the latter is much more demanding.

In summary, the district court denied immunity based on what was considered established law applicable to initial transfer. After trial, the court determined that the initial transfer was proper but imposed liability on a different basis. That violation, however, was not analyzed to determine if it was in contravention of clearly established law. I am persuaded that test has not been met and that the defendants are entitled to qualified

immunity. I would therefore reverse and enter judgment for defendants.

A True Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GREGORY S. SOURBEER, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 79-0748
WILLIAM ROBINSON, et al. Defendants	:	

M E M O R A N D U M

I. Introduction

Plaintiff, Gregory S. Sourbeer, an inmate at the State Correctional Institution at Camp Hill, Pennsylvania, filed a 42 U.S.C. §1983 complaint alleging a violation of his First Amendment right to religious freedom, and violations of his substantive and procedural due process rights under the Fourteenth Amendment. The defendants are William B. Robinson, former Pennsylvania commissioner of corrections, Ernest S. Patton, former superintendent

at SCI-Camp Hill, Ronald Marks, former deputy superintendent at SCI-Camp Hill, Harry Bell, former deputy superintendent for treatment at SCI-Camp Hill and William Harrison, director of treatment at the prison. The complaint arises from plaintiff's incarceration in the restricted housing unit (RHU) of the prison in administrative custody following his conviction for the murder of his mother in the Court of Common Pleas of Lancaster County, Pennsylvania. Plaintiff was in administrative custody from October 13, 1976, his first day at Camp Hill, until October 27, 1977, when he was returned to Lancaster County for sentencing. Persons in administrative segregation are denied privileges available to the general prison population.

A trial without a jury was held on January 22, 1985. Plaintiff was represented by counsel. In addition to the evidence produced at the hearing, the parties submitted a statement of undisputed facts. The following are the court's findings of fact, discussion, and conclusions of law. The findings of fact incorporate the parties' statement of undisputed facts.

II. Findings of Fact

A. The Parties

1. Plaintiff is Gregory S. Sourbeer, an individual who was first incarcerated at the State Correctional Institution at Camp Hill (hereinafter "SCI-Camp Hill") on October 13, 1976.

2. Defendants all are, or at one time were, employed by the Commonwealth of Pennsylvania, Bureau of Correction.

3. William B. Robinson served as the Commissioner of Correction from August, 1975 to June, 1980. Since June, 1980, Mr. Robinson has been a private citizen.

4. Ernest S. Patton was Superintendent of SCI-Camp Hill from December, 1968 to January, 1984 when he retired.

5. Ronald J. Marks served as the Deputy Superintendent of Operations at SCI-Camp Hill from December, 1974 to July, 1979. Mr. Marks is a former Commissioner of the Bureau of Correction.

6. J. Harvey Bell served as the Deputy Superintendent for Treatment at SCI-Camp Hill from April, 1975 to October, 1979. Mr. Bell is currently employed as Director of Program Division, Bureau of Correction.

7. William Harrison has been the Director of Treatment at SCI-Camp Hill since May, 1975.

B. Plaintiff's Transfer to SCI-Camp Hill

8. On October 4, 1976 plaintiff was convicted by a jury of murder in the first degree in the Court of Common Pleas of Lancaster County, Pennsylvania for killing his mother. Plaintiff, although unsentenced, was transferred from the Lancaster County jail to SCI-Camp Hill on October 13, 1976.

9. Plaintiff at the time of the transfer was fifteen years of age, his date of birth being April 7, 1961.

10. The reason Lancaster County authorities filed a petition to have plaintiff transferred from their jail to SCI-Camp Hill was that they viewed him as a security risk because of his age and their belief he could receive proper supervision at SCI-Camp Hill.

11. The warden of the Lancaster County Prison indicated that plaintiff should be placed in maximum security due to his offense.

12. Plaintiff was classified an H.V.A. (Hold for Various Authorities) prisoner when he arrived at SCI-Camp Hill.

13. Plaintiff was classified as an H.V.A. prisoner because he was unsentenced.

14. Plaintiff remained at SCI-Camp Hill as an unsentenced prisoner from October 13, 1976, to October 27, 1977, on which date he was returned to Lancaster County for sentencing.

C. The Nature of Plaintiff's Confinement Subsequent to Transfer to SCI-Camp Hill

15. From October 13, 1976, to October 27, 1977, plaintiff was housed in the Restricted Housing Unit (hereinafter "R.H.U.") at SCI-Camp Hill in administrative custody status.

16. The R.H.U. at SCI-Camp Hill is the most secure housing area of the correctional institution.

17. The R.H.U. is a separate wing of the Institution and houses inmates who are punished for rules violations or who are segregated from the general inmate population for administrative reasons.

18. During his confinement in administrative custody, plaintiff was (1) denied entertainment and recreational privileges available to inmates in general population; (2) required to eat all meals in his cell; (3) permitted only one hour of exercise per day, Monday through Friday, outside of his cell; (4) was not permitted exercise on Saturdays and Sundays; (5) denied regular visiting privileges available to inmates in population.

19. During his confinement in administrative custody, plaintiff was not permitted to attend religious services in the prison chapel.

20. During his confinement in administrative custody, plaintiff did not have access to vocational training programs otherwise available to inmates at the SCI-Camp Hill.

21. During his confinement in administrative custody, plaintiff was not permitted to participate in regular educational programs available to other inmates at the SCI-Camp Hill.

22. Plaintiff was not permitted to physically go to the SCI-Camp Hill library from October 13, 1976 until October 27, 1977.

23. Law library service to inmates in administrative segregation did not begin until April 11, 1978.

D. Procedures Associated with the Placement of Plaintiff in Administrative Custody

24. There was no formal investigation conducted in connection with the initial decision to place the plaintiff in administrative custody.

25. Plaintiff was given no notice of, opportunity to participate in, or reasons for the initial decision to place him in administrative custody.

E. Bureau of Correction Policy with Respect to H.V.A. Inmates

26. The policy on H.V.A. prisoners which was in effect from March 17, 1975 to January 7, 1977, provided in pertinent part as follows:

> Although it may be desirable and necessary to segregate H.V.A. cases, there is no legal requirement to keep H.V.A. cases physically separated, when programmatic considerations warrant housing with sentenced

> inmates, this is permissible.... H.V.A. cases cannot be required to work or participate in programs. If the inmate requests work or program placement, he may be evaluated by the staff for such placement subject to certain guidelines. A). Work should be on a supervised detail. Regular institutional wage regulations apply. B). Shortterm program placement is permissible where adequate supervision is available.

27. On January 7, 1977, an administrative memorandum on H.V.A. cases was issued by defendant Robinson to the Superintendents of the state correctional institutions which superseded the previous policy. It provided in pertinent part as follows:

> Generally H.V.A. cases shall be assigned to Administrative Custody. Exceptions are: 1) Medical cases requiring hospital or infirmary placement. 2) Disciplinary cases from the

> county or as a result of misconduct who require disciplinary custody. The institution shall determine the level of Administrative or Disciplinary custody (close or maximum) based on the individual circumstances on a case by case basis... H.V.A. cases are excluded from program participation and work assignments They are limited to the routine activities of the Administrative Custody Unit.

28. On April 7, 1977, a memo was issued by defendant Robinson to the Superintendents of the state correctional institutions which further revised the H.V.A. policy. The Superintendents were instructed that when an H.V.A. case was received at their institution, a formal hearing was to be held to determine the housing category in which the individual was to be placed. The memo provided, in pertinent part, as follows:

C. Housing:

1. HVA cases received as medical transfers shall be placed in the hospital or infirmary.

2. All other HVA cases shall, upon reception, be placed in Administrative Custody pending a formal hearing to determine appropriate housing....

3. The formal hearing shall be held as prescribed in BC-ADM 801. At this time all relevant information shall be reviewed and the appropriate housing category shall be determined based on the individual inmate and the circumstances surrounding his case.

F. Bureau of Correction Regulations Concerning Administrative Custody

29. Pursuant to Bureau of Correction Administrative Directive 801 in effect from June 1, 1974 until February 12, 1977, Administrative Custody status was designed for use for those inmates requiring closer supervision or

protection than was provided in the general inmate population and as a temporary assignment for inmates pending further classification. (§ V,A)

30. Although Administrative Directive 801 was revised effective February 12, 1977, the identicial language of Section V, A was retained.

31. Pursuant to Administrative Directive 801 in effect in 1976 and revised in 1977, all inmates who were housed in the R.H.U. were entitled to have their program status reviewed by the Program Review Committee (hereinafter "P.R.C.") of the institution in which they were incarcerated.

32. Under the Directives, the P.R.C. as a committee was responsible for reviewing in person, at least once every thirty days, those inmates who were housed in the R.H.U.

33. Pursuant to Bureau of Correction Administrative Directive 801 in effect from June 1, 1974 until February 12, 1977, the P.R.C. was required to review bi-weekly those cases of inmates held in administrative custody by reason of self-imposed confinement, protective administrative confinement, transfers, etc. (§ III, I 4)

34. Administrative Directive 801 which was in effect when plaintiff was transferred to SCI-Camp Hill on October 13, 1976, did not enumerate the factors which the P.R.C. was to consider in determining whether an inmate's continued confinement in administrative custody was appropriate and necessary.

35. Pursuant to Administrative Directive 801, effective February 12, 1977, the P.R.C. determination of whether continued segregated housing was warranted was based upon a review of counselor notes and recommendations, psychological and psychiatric reports when available, recommendations by other staff and their written observations regarding the subject's attitude and actions, and the subject's attitude and actions during the review. (§III(G)(4))

36. Under both 801 Directives, the Superintendent was required to review the case of each inmate who is separated from the general population for thirty days or more.

37. Pursuant to Bureau of Correction Administrative Directive 801 in effect from June 1, 1974 until February 12, 1977, the Superintendent was required to

personally review the case of each inmate separated from general population at least once every sixty days and maintain a written report of his findings in each case. (§VI G)

38. Pursuant to Administrative Directive 801, effective June 1, 1974 to February 12, 1977, residents detained in administrative custody for more than thirty days shall have their cases reported to the Commissioner of Correction, together with the rationale for such status and the particular programs prescribed. (§I 5)

39. Pursuant to Administrative Directive 801, effective February 12, 1977, where an inmate was detained in administrative custody for more than thirty days, the Commissioner of Correction is required to be notified by the Superintendent. The Superintendent

is required to provide the Commissioner with his comments as well as those of the P.R.C. In addition the rationale for such status and particular programs prescribed shall be stated. (§III(G)(4))

40. Pursuant to Administrative Directive 801, effective February 12, 1977, inmates in administrative custody are required to be interviewed weekly by the treatment staff and the P.R.C. is directed to release an inmate from administrative custody as soon as appropriate. (§VI C)

41. Administrative Directive 801, effective February 12, 1977, requires the P.R.C. to arrange for a thorough annual psychological and psychiatric examination for all inmates continuously confined in administrative custody for a period of one year. (§III G 4)

G. Review of Plaintiff's Confinement in Administrative Custody by the Program Review Committee

42. Approximately every thirty days between October 13, 1976 and October 28, 1977, the P.R.C. conducted a review of plaintiff's custody status.

43. Defendants Marks, Bell and Harrison, at one time or another, were members of the P.R.C. that reviewed plaintiff's custody status.

44. Plaintiff was not in attendance when the P.R.C. reviewed his case on October 14, 1976.

45. On November 17, 1976, plaintiff was seen by the P.R.C. and continued in administrative custody. The reason given for the P.R.C.'s decision was as follows:

> Subject is here from the Lancaster County Prison for Administrative reasons. He is awaiting trial on a murder charge.
>
> We will continue subject in A.C. as we get to know him & he adjusts to the institution.

46. On December 15, 1976, plaintiff was seen by the P.R.C. and continued in administrative custody. The reason given for the P.R.C.'s decision was as follows:

> Subject is here from Lancaster County & charged with murder. He is in need of close supervision & structure at this time. We will continue him in A.C. & work with him in the hopes he can be placed in general population.

47. On January 12, 1977, plaintiff was seen by the P.R.C. and continued in administrative custody. The reason given for the P.R.C.'s decision was as follows:

> Subject is a transfer from Lancaster County for security reasons. He remains in A.C. for his own protection.

48. On February 16, 1977, plaintiff was seen by the P.R.C. and continued in administrative custody. The reason given for the P.R.C.'s decision was as follows:

> H.V.A. case who has been charged with murder. Due to his status must remain in A.C. status. Currently under hospital care.
>
> Remain in A.C. status.

49. On March 16, 1977, plaintiff was seen by the P.R.C. and continued in administrative custody. The reason given for the P.R.C.'s decision was as follows:

> Mr. Sourbeer was interviewed today. No progress has been made on the litigation or his bail status.
>
> He will continue in A.C.

50. On April 13, 1977, plaintiff was seen by the P.R.C. and continued in administrative custody. The reason given for the P.R.C.'s decision was as follows:

> Subject is 16 years old & from Lancaster County awaiting trial for murder. He was transferred here from the county for security reasons & his age. Continue in A.C. for his protection & the fact he is unsentenced.

51. On June 8, 1977, plaintiff was seen by the P.R.C. and continued in administrative custody. The reasons given for the P.R.C.'s decision was as follows:

> Subject is here from Lancaster County & is awaiting trial for murder.
>
> Subject is 16 years old & has special program needs at this time that require an administrative custody setting.
>
> Continue in A.C.

52. On July 6, 1977, plaintiff was seen by the P.R.C. and continued in administrative custody. The reasons given for the P.R.C.'s decision was as follows:

> Subject is a transfer from Lancaster County for protective custody & is awaiting trial for murder.
>
> He will remain in A.C. for programmatic reasons.

53. On August 10, 1977, plaintiff was seen by the P.R.C. and continued in administrative custody. The reason given for the P.R.C.'s decision was as follows:

> H.V.A. from Lancaster Co. Murder charge pending. Expects court action in September. Continue on present status due to nature of the case. No problems indicated. Remain in A.C.

54. On September 13, 1977, plaintiff was seen by the P.R.C. and continued in administrative custody. The reason given for the P.R.C.'s determination was as follows:

> Subject is an H.V.A. from Lancaster County & awaiting trial for murder.
>
> In light of his H.V.A. status & the murder charge his program needs can best be suited in A.C.
>
> Other: Security

55. On October 12, 1977, plaintiff was seen by the P.R.C. and continued in administrative custody. The reason given for the P.R.C.'s decision was as follows:

H.V.A. - from Lancaster County. Murder charge pending.

Subject is an H.V.A. from Lancaster County. He has been found guilty of murder & not sentenced. He is awaiting disposition of his appeal.

In light of his H.V.A. status & charge his programmatic needs can best be served in A.C.

H. Miscellaneous

56. Three clergyman were employed at SCI-Camp Hill during the period plaintiff was incarcerated at SCI-Camp Hill as an H.V.A.

57. One of the three clergymen, employed at SCI-Camp Hill during the period plaintiff was an H.V.A., went to the R.H.U. daily, walked by each cell, and provided pastoral counseling and bible reading, and prayed with any

inmate who so desired. The only exception to this daily routine occurred on major holidays.

58. Each inmate incarcerated at SCI-Camp Hill may designate a spiritual advisor on his visiting list.

59. There are no restrictions on the number of times a spiritual advisor may visit an inmate.

60. Plaintiff did not designate anyone as a spiritual advisor during the period of time he was incarcerated at SCI-Camp Hill as an H.V.A.

61. Plaintiff was permitted visits from family members, relatives, friends, attorneys and a spiritual advisor during the time he was incarcerated at SCI-Camp Hill as an H.V.A.

62. Plaintiff received visits from family members, relatives and attorneys during the time he was incarcerated at SCI-Camp Hill as an H.V.A.

63. Plaintiff had visits on eight dates during the time he was incarcerated at SCI-Camp Hill as an H.V.A.

64. During the period he was incarcerated at SCI-Camp Hill as an H.V.A., plaintiff communicated with defendant Robinson only once. On July 5, 1977, plaintiff wrote defendant Robinson on an inmate's request to staff form, requesting that he be permitted to be placed in the Columbia Hospital, Columbia, Pennsylvania, under the care and treatment of his own doctor.

65. During his confinement in administrative custody as an unsentenced inmate, plaintiff was never charged with a major or minor misconduct.

66. Other factors considered by the P.R.C. in plaintiff's case were his sentence status and his age.

67. Plaintiff was returned to SCI-Camp Hill on November 3, 1977 from the Lancaster County prison; on November 4, 1977 plaintiff was given a population number; on December 6, 1977 plaintiff was classified by the Classification Center at SCI-Camp Hill; and on December 8, 1977 plaintiff was given population status.

68. During the period of plaintiff's confinement in administrative custody, three unsentenced inmates had been transferred from administrative custody and placed in population at SCI-Camp Hill.

69. At no time during his confinement in administrative custody was plaintiff given a complete psychological and psychiatric examination.

70. After plaintiff was released to the general population he attended worship services only five times in 1978.

III. Discussion

A. Plaintiff's First Amendment freedom of religion claim

Plaintiff contends that his confinement in administrative custody violated his First Amendment right to freedom of religion. We reject this claim because the only religious restriction placed upon prisoners in the RHU was from attending chapel services with the general population. Defendant

Marks testified concerning the valid security reasons for that restriction which is constitutional. (N.T. 57). See St.Claire v. Cuyler, 634 F.2d 109 (3d Cir.) reh'g denied, 643 F.2d 103 (3d Cir. 1980). Plaintiff had access to a spiritual counselor of his own choice, (U.F. 65) and religious material (N.T 58). Shortly after his arrival he was provided with a bible. (N.T. 19). Significantly, after plaintiff was released to the general population, and was permitted to attend worship services, he took advantage of those opportunities only five times in 1978. (N.T. 29-30). We find no violation of plaintiff's right to practice his religion, because although he was not permitted to attend services he was afforded an opportunity to practice his religion while confined.

Additionally we also conclude his complaint concerning the exercise of his religion was not credible and sincere.

B. Plaintiff's substantive due proces claim

Plaintiff's substantive due process claim must arise from a liberty interest protected by state law. Generally, a prisoner has no liberty interest in any specific conditions of confinement. As observed by the Supreme Court in Hewitt v. Helms, 459 U.S. 460, 468, 103 S.Ct. 864, 869-70, 74 L.Ed.2d 675, 686 (1983):

> As we have held previously, these decisions require that "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the

> sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." Montanye v. Haymes, 427 U.S. 236, 242, 49 L.Ed.2d 466, 96 S.Ct. 2543 (1976). See also Vitek v. Jones, 445 U.S. 480, 493, 63 L.Ed.2d 552, 100 S.Ct. 1254 (1980).
>
> It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence.

This observation applies to the case at bar although Sourbeer, unlike the inmate in Hewitt, had been placed in administrative custody from his first day at Camp Hill and had not been transferred there after originally being in the general population. While we had previously

decided that Sourbeer did have a liberty interest in being in the general population created by Pennsylvania Bureau of Correction Administrative Directive 801 (Directive) and Administrative Memorandum - HVA Cases (Memorandum), see Sourbeer v. Robinson, No. 79-0748 (M.D. Pa. April 2, 1984) (Caldwell, J.), this conclusion cannot hold true for Sourbeer's entire time in administrative segregation. The Memorandum did not remain substantively the same throughout Sourbeer's stay in administrative custody. We believe that one version, in effect between January 7, 1977 and April 7, 1977, eliminated for that period of time Sourbeer's liberty interest in being in the general population. That Memorandum provided that HVA cases like Sourbeer would in administrative custody. (U.F. 27). Thus, unlike

the inmate in Hewitt, for the period of time that that version of the Memorandum was in effect, there was no procedural standard which, when complied with, would have entitled Sourbeer to enter the general population. Accordingly, because Sourbeer had no liberty interest in being in the general population his constitutional rights were not violated during this time and no award of damages can be made for this period. Of course, our prior conclusion still holds for those times that the Memorandum did contemplate the entry of HVA prisoners into the general population. Sourbeer did have a liberty interest during those times protected by the due process clause

which we will address in the following section dealing with his procedural due process claim.

C. Plaintiff's procedural due process claim

At the trial plaintiff focused upon the procedural requirements set forth in the Directive and Memorandum. Plaintiff's cause of action under section 1983, however, must be measured by the requirements of the due process clause. The procedure set forth by the Court in Hewitt is appropriate here:

> An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation. Ordinarily a written statement by the inmate will accomplish this purpose, although prison

> administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be ineffective. So long as this occurs, and the decisionmaker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied.

Id. at 476, 103 S.Ct. at 874, 74 L.Ed.2d at 691 (footnote omitted). The Court further stated:

> The proceeding must occur within a reasonable time following an inmate's transfer, taking into account the relatively insubstantial private interest at stake and the traditionally broad discretion of prison officials.

Id. at n.8, 103 S.Ct. at 874 n.8, 74 L.Ed.2d at 691 n.8.

Plaintiff was not given notice of, nor was he present at, his initial hearing by the PRC on October 14, 1976. He was present at his second review on November 17, 1976 and subsequent ones which were held approximately thirty days apart.

Plaintiff's procedural due process rights were not violated by his absence at the initial hearing. All that due process requires is a hearing "within a reasonable time" following plaintiff's classification in administrative custody. Prison officials who had no personal knowledge of an inmate transferred from a county prison after his conviction for murder, could constitutionally segregate that inmate for a period of time in the interest of prison security especially when the transferring county authorities did so because

they considered the inmate a security risk who should be placed in maximum security (U.F. 10, 11). We believe that the November 17, 1976, hearing was timely and that Sourbeer's stay in administrative custody prior to that time was proper.

The issue becomes closer after the November 17, 1976 and December 15, 1976 hearings. After both of these hearings the PRC concluded that Sourbeer should remain in administrative custody. They still expressed a desire, however, to get to know him and a hope that he could be placed in the general population. There is a tension here between the legitimate concerns of prison administrators and plaintiff's due process rights. The language of the court in Mims v. Shapp, 744 F.2d 946, 951 (3d Cir. 1984), is apropos:

Our concern in the present case is not with the process that is due for the initial segregated confinement decision, but rather with what process is due during the periodic reviews that determine whether the confinement should be continued. The Hewitt decision is instructive here as well. The Court in Hewitt cautioned that "administrative segregation may not be used as a pretext for indefinite confinement of an inmate. Prison officials must engage in some sort of periodic review of the confinement of such inmates." 459 U.S. at 477 n.9, 103 S.Ct. at 874 n.9. However, and highly relevant to the disposition of the case before us, the Hewitt court noted that in making administrative segregation determinations, prison administrators could rely on "purely subjective evaluations and on predictions of future behavior." Id. at 472, 103

S.Ct. at 872 (quoting Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 464, 101 S.Ct. 2460, 2464, 69 L.Ed.2d 158 (1981)).

Based upon Mims, we believe we should pay judicial deference to these early determinations by prison officials. The officials were obviously still trying to assess Sourbeer's personality during these first months of his confinement. We decline to second guess them. Accordingly, we find no constitutional violations in these determinations.

The next periodic review took place on January 12, 1977, after the HVA Memorandum of January 7, 1977, was issued. As discussed above, this Memorandum required generally that HVA cases remain in administrative custody. This policy was in effect until April 7, 1977. Since plaintiff had no due process

right to be in the general population during this time, we find no constitutional violation.

Our greatest scrutiny must be reserved for those periodic reviews taking place between April 13, 1977 and October 12, 1977. The HVA policy had been reversed on April 7, 1977 to permit HVA cases once again to join the general population, if appropriate, after a formal hearing in accordance with the Directive. In assessing these periodic reviews we must bear in mind two considerations. First, as the court stated in Mims:

> [T]he governmental interest involved in a good faith decision to subject a prisoner to administrative segregation may fluctuate with the passage of time and change of circumstances. The validity of the government's interest in prison safety

> and security as a basis for restricting the liberty rights of an inmate subsists only as long as the inmate continues to pose a safety or security risk. It was upon this basis that the Hewitt Court noted that periodic review of administrative segregation decisions is necessary. Hewitt, 459 U.S. at 477 n.9, 103 S.Ct. at 874 n.9.
>
> To insure that periodic review does not become simply a sham, the content and substance of that review must be scrutinized under the illumination of the fourteenth amendment.

744 F.2d at 953-54 (brackets added). Second, recently in Davidson v. O'Lone, 752 F.2d 817 (3d Cir. 1984) (en banc), the Third Circuit Court of Appeals held that mere negligence on the part of state officials resulting in a violation

of a liberty interest will not support a cause of action under §1983. Id. at 829. Instead, "actions may be brought in federal court under §1983 when there has been infringement of a liberty interest by intentional conduct, gross negligence or reckless indifference, or an established state procedure." Id. at 828 (footnote omitted).

From the testimony at trial we have no doubt of the sincerity of the prison officials in carrying out their duties on the PRC. They did not act with evil motive or intent. There was no intentional misconduct or reckless indifference here.(1) We do believe,

(1) Thus, we reject plaintiff's claim for punitive damages. See Smith v. Wade, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983).

however, that there was gross negligence requiring the award of some damages for the 197 day period from April 13, 1977, until October 27, 1977, the last day of plaintiff's confinement in administrative custody.

Defendant Marks voiced some concern at trial about plaintiff's withdrawn, standoffish, uncommunicative behavior and "bad attitude" (N.T. 53-55), but plaintiff was not issued any misconducts during his stay in administrative custody. (N.T. 78-79). In this light, these general observations of Sourbeer's personality cannot justify his segregation. Compare Mims, supra. Significantly, while there was concern about Sourbeer's personality, he was not given any psychiatric or psychological evaluations during his stay at Camp Hill.

(N.T. 22; U.F. 56). Finally, and more importantly, Sourbeer's segregated position seems to have resulted simply from his HVA status. Despite the revised HVA memo issued on April 7, 1977, one-half of the periodic reviews from April 24, 1977 onward noted plaintiff's HVA or unsentenced status as a reason for keeping him in administrative custody. (U.F. 50, 4, 55). Defendant Marks admitted that this was one reason for plaintiff's segregation. (N.T. 68). Despite the prison officials' stated concern about plaintiff's "programmatic needs," among other things, shortly after Sourbeer was sentenced by the Lancaster County Court he was moved into the general population. (U.F. 74). We think that over time reasons which would

have justified Sourbeer's early detention in administrative custody were applied in a rote fashion in later reviews when experience should have led officials to let Sourbeer into the general population.

D. Liability of the Individual Defendants

We cannot award damages against all of the defendants. William B. Robinson, Commissioner of Correction during the time pertinent to the case at bar, performed no actionable conduct. He was not a member of any of the P.R.C.s and was not constitutionally required to review their actions. While he did issue materially different versions of the Memorandum, as discussed above in section B, these memorandums could not have violated Sourbeer's constitutional rights.

The remaining defendants took part at one time or another in the periodic decisions to keep plaintiff in administrative custody during the critical period discussed in section C above. Accordingly, they are liable for violating plaintiff's constitutional rights.

E. Conclusions of Law

1. Defendants, Ernest S. Patton, Ronald J. Marks, J. Harvey Bell and William Harrison, committed gross negligence in the conduct of the periodic reviews taking place between April 13, 1977 and October 12, 1977.

2. Plaintiff had a liberty interest created by state law and protected by the due process clause of the

Fourteenth Amendment in being in the general prison population from October 13, 1976 until January 6, 1977 and from April 7, 1977 until October 27, 1977.

3. Defendants Patton, Marks, Bell and Harrison violated plaintiff's due process rights during the periodic reviews from April 13, 1977 until October 12, 1977.

F. Award of Damages

Under all the circumstances, we find an award of ten dollars ($10.00) per day for the 197 days from April 13, 1977 until October 27, 1977 to be proper. We will issue an appropriate order.

/s/
William W. Caldwell
United States District Judge

Date: March 20, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GREGORY S. SOURBEER, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 79-0748
WILLIAM ROBINSON, et al. Defendants	:	

O R D E R
&
J U D G M E N T

AND NOW, this 20th day of March, 1985, it is ordered and adjudged that judgment shall be and is hereby entered in favor of plaintiff and against defendants, Ernest S. Patton, Ronald J. Marks, J. Harvey Bell and William Harrison, in the amount of one thousand nine hundred seventy dollars ($1,970.00). No interest is awarded.

The Clerk of Court shall close this file.

William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GREGORY S. SOURBEER, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 79-0748
WILLIAM ROBINSON, et al. Defendants	:	

M E M O R A N D U M

Before the court is defendants' motion for reconsideration of our ruling with respect to their motion for summary judgment on the issue of qualified immunity. At the request of the parties, we will also at this time reconsider in entirety our memorandum and order of April 2, 1984 by which we denied the cross motions for summary judgment.

We first consider anew the issue of qualified immunity. As the Supreme Court indicated in Harlow v.

Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), government officials performing discretionary functions are entitled to qualified immunity from civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. 457 U.S. at 818, 73 L.Ed.2d at 410. The sole source of any liberty interest in plaintiff's remaining in the general prison population was identified in Hewitt v. Helms, ___ U.S. __, 74 L.Ed.2d 675 (1983) as state regulations, mandatory in language, which require specific substantive predicates to close confinement. 74 L.Ed.2d at 688. Specific to the situation before us, the prison regulations in issue were held to create a protectible liberty interest in the case of an HVA prisoner

like the plaintiff in the recent case of Drayton v. Robinson, 719 F.2d 1214 (3d Cir. 1983). In our initial decision, we had relied upon several appellate cases from this circuit which predated the plaintiff's period of administrative segregation. See Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972); U.S. ex rel. Tyrrell v. Speaker, 471 F.2d 1197 (3d Cir. 1973); Biagiarelli v. Sielaff, 483 F.2d 508 (3d Cir. 1973). Defendants contend that these cases are inapposite. The parties have once again thoroughly briefed the issues and have supplemented their briefs with correspondence apprising us of freshly discovered evidence and decisional authority.

In re-examining our position, we begin by re-evaluating the applicability of the cases upon which we initially relied. In Grav v. Creamer, the court considered the application of procedural due process to disciplinary transfer proceedings of prisoners from the general population to segregation:

> We do not consider it appropriate ... to suggest what may be the precise requirements of the due process clause in this case, since the determination of 'what process is due' will necessarily depend upon facts to be developed in the district court upon remand.... But we do hold that the transfer of a prisoner from the general prison population or solitary confinement without either notice of the charges or a hearing does not, absent unusual circumstances not evident in the pleadings, meet minimum due process requirements.

465 F.2d at 185. In U.S. ex rel. Tyrrell v. Speaker, an untried prisoner who was transferred from a county jail to a state prison as a security risk and placed in punitive segregation argued that this action was arbitrary, suspicious, and without basis in fact. The court held that

> Gray requires that Tyrrell's transfer to punitive segregation by the Superintendent of Graterford or a warden of the Delaware County Prison be based, after hearing, on 'facts rationally determined.'

471 F.2d at 1203. The case was remanded because the court could not determine, from the record before it, the basis for the decision to impose segregation.

Finally, in Biagiarelli v. Sielaff, the court considered the case of an inmate who was removed from the

general population and placed in administrative segregation because authorities had received information that he was to be involved in an escape attempt. Although the inmate had not been afford- ed a hearing, the court found that some process was due:

> Biagiarelli was only entitled to either written notice of the basis for his removal from the prison population and an opportunity to rebut the charge, or a hearing. When the notice reasonably should have been given, or the hearing held, depended on when the threat to the institution subsided, regardless of whether he was held in punitive or administrative segregation.

483 F.2d at 512.

As defendants have observed, the three cited cases are factually distinguishable in that none concerns, as here, a convicted but unsentenced prisoner. We do not, however, find anything in the language of any of the cases to indicate that the court intended that they be read so narrowly as to eliminate due process requirements in such a case. Further, although Gray and Biagiarelli concerned punitive transfers of sentenced prisoners from the general population to segregation, the Tyrrell case involved the transfer of an unsentenced (and untried) prisoner from a county jail to the maximum security segregation unit of Graterford State Prison.[1] We believe the cases cited

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[1] It is true that this transfer did have punitive overtones, since the prisoner had been charged with an escape attempt at the jail.

fairly established that some process was due plaintiff in the instant case and placed defendants on notice of this fact.

As we pointed out in our previous opinion, we appreciate that procedural due process requirements in cases such as this did not precisely crystallize until Hewitt v. Helms. Still, it is true from the cases cited that certain aspects of procedural due process were clearly required prior to plaintiff's incarceration. All of the cases required that a transferee be accorded initial notice of any charges against him or a hearing at some early stage. Hewitt similarly requires "an informal nonadversary review of the information supporting ... administrative confinement, including whatever statement respondent wishes to submit

within a reasonable time after confining him to administrative segregation." ___ U.S. ___, 74 L.Ed.2d at 689.

Nor is the matter quite so simple as according defendants good faith immunity on the basis of procedural requirements alone. The clear import of the cases cited, most especially Tyrrell, is that prison authorities may not act arbitrarily in transferring a prisoner from the general prison population to segregation. This requirement of reasonable action forms the basis of plaintiff's substantive claim and was a requirement which we believe to have been clearly established at the time of plaintiff's transfer. Although we do not base our decision on the Bureau of Correction's memoranda which have been called to our attention

or on the subjective state of mind of prison officials, we do feel that these memoranda reflect on the reasonableness of our decision that a right to procedural and substantive due process was clearly established at the time of plaintiff's confinement and on the reasonableness of requiring defendants to be aware of this.(2)

We have also reread the materials submitted to us by both parties in support of their motions for summary judgment. At the pre-trial conference, counsel for the parties assured us that there were no further facts to be brought

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(2) These memoranda include, inter alia, the memorandum dated April 7, 1977, referenced in our earlier opinion, wherein defendant Robinson advises of prison superintendent's revision of policy to include formal hearings in determining housing categories so as "to comply with court rulings."

out and urged us to decide the case on the statement of undisputed facts and the cross motions for summary judgment. The fact that the parties are agreed that the case should be resolved on cross motions does not authorize us to so decide it when a plenary trial is appropriate. See Rains v. Cascade Industries, Inc., 402 F.2d 241, 245 (3d Cir. 1968). In the instant case, despite the parties' assurances, we feel uncomfortable about deciding the issues on the record before us. Plaintiff argues that he was arbitrarily and unreasonably confined in administrative segregation by reason of his status.(3) Defendants counter that his continued

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(3)As we noted previously, this interfaces with plaintiff's procedural claim that he was denied periodic meaningful reviews.

confinement was not an unreasonable response to legitimate security concerns. We appreciate that in responding to security concerns defendants are not required simply to react to an overt act by a prisoner and may take many factors into consideration in categorizing a prisoner for security reasons. Because of the cryptic and often contradictory decision of the Program Review Committee, and the nature of the plaintiff's allegations concerning the actual as opposed to stated basis for his continued confinement in the Restricted Housing Unit, we are unable to resolve the critical substantive issues of this case without a trial. See, Memorandum of April 2, 1984, pp. 8-10. Procedurally, there are also issues, such as the reasonableness of defendants' delay

in allowing plaintiff to participate in the review procedures, which we are reluctant to resolve summarily. We realize that a trial may not bring additional facts to light but, under the circumstances, we feel the need to have the facts introduced through witnesses who are subject to cross examination.

An appropriate order will be entered.

/s/
William W. Caldwell
United States District Judge

Date: August 2, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GREGORY S. SOURBEER, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 79-0748
WILLIAM ROBINSON, et al. Defendants	:	

ORDER

AND NOW, this 2nd day of August, 1984, the motion for reconsideration is DENIED. The case will be scheduled for trial by subsequent order.

/s/

William W. Caldwell
United States District Judge

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NO. 86-419

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1986

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J. HARVEY BELL and WILLIAM HARRISON,
Petitioners

v.

GREGORY S. SOURBEER,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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The respondent, Gregory S. Sourbeer, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Third Circuit's decision in this case. That opinion is reported at 791 F.2d 1095 (3d Cir. 1986).

STATEMENT OF THE CASE

1. On October 13, 1976, respondent, Gregory Sourbeer, was transferred from a county jail to a state prison following his conviction for homicide. Sourbeer was unsentenced at the time of the transfer. (Pet. p. 95a). Upon arriving at the state prison, Sourbeer was placed in an isolation cell in administrative segregation. Sourbeer remained in isolation for the following twelve months. On October 27, 1977, Sourbeer was returned to the trial court for sentencing. Following sentencing, Sourbeer was returned to the state prison and subsequently placed in the general prison population. (Pet. p. 97a).

During his twelve months of segregative confinement, Sourbeer was housed in the maximum security unit, a separate

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The respondent, Gregory S. Sourbeer, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Third Circuit's decision in this case. That opinion is reported at 791 F.2d 1095 (3d Cir. 1986).

STATEMENT OF THE CASE

1. On October 13, 1976, respondent, Gregory Sourbeer, was transferred from a county jail to a state prison following his conviction for homicide. Sourbeer was unsentenced at the time of the transfer. (Pet. p. 95a). Upon arriving at the state prison, Sourbeer was placed in an isolation cell in administrative segregation. Sourbeer remained in isolation for the following twelve months. On October 27, 1977, Sourbeer was returned to the trial court for sentencing. Following sentencing, Sourbeer was returned to the state prison and subsequently placed in the general prison population. (Pet. p. 97a).

During his twelve months of segregative confinement, Sourbeer was housed in the maximum security unit, a separate

wing of the state prison that houses prisoners who have violated prison rules or who are for other reasons segregated from the general population. (Pet. p. 98a). As with prisoners who were being disciplined, Sourbeer was locked in his cell twenty-three hours a day, Monday through Friday. On weekends and holidays, confinement was continuous with no opportunity for out-of-cell exercise. Because of his status as a segregated prisoner, Sourbeer was denied visiting privileges accorded prisoners in general population. He was not allowed to participate in educational and vocational training programs, attend religious services in the prison chapel, use the prison library or otherwise participate in the many educational, training, and recreational opportunities open to non-segregated prisoners. (Pet. pp. 98a-99a). During his confinement in segregation, Sourbeer was never examined, tested or evaluated by a psychologist or psychiatrist, although state law required such for prisoners confined continuously for a period of one year. (Pet. pp. 15a, 108a). Sourbeer was never charged with a violation of prison rules during his months in segregation. (Pet. pp. 15a, 118a).

2. On July 14, 1979, Sourbeer commenced a civil rights action alleging inter alia[1] that petitioners had acted unreasonably in conducting the periodic reviews that occurred during the twelve-month period he was unsentenced. Prior to trial, petitioners conceded that Sourbeer had a

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[1] In his Complaint, Sourbeer also claimed petitioners had failed to hold a timely hearing after his placement in segregation and to supply him with the reasons for his confinement. Sourbeer further claimed that petitioners had denied him his First Amendment right to practice his religion by not permitting him to attend religious services in the prison chapel.

"protectable liberty interest in being in the general prison population ..." during the period of his isolative confinement. (App. 2a). The parties stipulated that during Sourbeer's confinement, Pennsylvania regulations required prison officials to review every thirty days a prisoner confined in segregation and to release inmates in segregation "as soon as appropriate" (Pet. pp. 105a, 108a). The parties also stipulated that during the twelve months of Sourbeer's confinement in segregation, three unsentenced inmates had been transferred from segregation and placed in the prison population. (Pet. p. 118a).

In two pre-trial opinions, the district court considered the petitioners' claim that they were entitled to qualified immunity (App. 1a-9a, Pet. pp. 140a-152a). In the initial decision, the court, relying on pre-1977 decisions of the Third Circuit, held that in 1977 reasonable officials should have known that prolonged confinement in isolative segregation "trigger[ed] due process protections." (App. 8a). In its second opinion, the court held that "the clear import" of pre-1977 cases of the Third Circuit was that "prison authorities may not act arbitrarily in transferring a prisoner from general prison population to segregation" and that the requirement of reasonable action was "clearly established at the time of plaintiff's transfer." (Pet. p. 148a). Although the parties had requested the court to decide the case on the basis of their cross-motions for summary judgment, the court, noting the "cryptic and often contradictory decisions" of officials who concluded the periodic reviews, concluded that it needed to hear evidence concerning the reasons for Sourbeer's prolonged isolation "introduced through witnesses subject to cross-examination." (Pet. pp. 151a-152a).

3. Following a non-jury trial, the court found that prison officials had acted unreasonably in the conduct of the periodic reviews during the period between April 13, 1977 and October 12, 1977.[2] In reviewing the testimony of the prison officials, the court held that "over time reasons which would have justified Sourbeer's early detention in administrative custody were applied in a rote fashion in later reviews when experience should have led officials to let Sourbeer into general population." (Pet. pp. 135a-136a).

The court ordered that Sourbeer be compensated in the amount of $10.00 a day for a 197-day period. (Pet. p. 138a).

4. On cross-appeals, the Third Circuit affirmed the district court's finding that Sourbeer had been denied due process in the reviews occurring from April through October 1977.[3] Sourbeer v. Robinson, 791 F.2d 1094 (3d Cir. 1986); Pet. pp. 11a-90a. The court found adequate support in the record for the district court's conclusion that the monthly reviews from April 1977 onward were "perfunctory, thus denying Sourbeer the most fundamental right of due process: a meaningful opportunity to be heard." 791 F.2d 1101, Pet. p. 38a. The court also affirmed the district

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[2]The district court also held that petitioners' initial review of Sourbeer's segregation was conducted in a timely manner, that Sourbeer did not have a liberty interest in population status during the months of January to April 1977 and that petitioners did not violate Sourbeer's First Amendment right by not permitting him to attend religious services in the prison chapel.

[3]The Third Circuit reversed the district court's finding that Sourbeer did not have a protected liberty interest between January through April 1977. 791 F.2d at 1100-1101, Pet. pp. 30-40a. It affirmed, however, the district court's award of damages and its finding that Sourbeer's First Amendment right to practice his religion had not been abridged. 791 F.2d at 1102, 1105, Pet. pp. 41a, 58a.

court's finding that prison officials were not entitled to qualified immunity as Sourbeer's due process rights were "clearly established within the meaning of Harlow" in that pre-1977 decisions of the Third Circuit had put prison officials on notice of "Sourbeer's liberty interest and his concomitant right to due process." 791 F.2d at 1104, Pet. pp. 50a-51a.

REASONS WHY PETITION SHOULD BE DENIED

Introduction

This is an unremarkable case involving well-established legal principles which resulted in a prisoner receiving a modest damage award for many months of unnecessary isolative confinement. In an effort to attract this Court's attention, petitioners claim the Third Circuit's allegedly "broad view of what constitutes 'clearly established right'" in determining qualified immunity raises "important questions of federal law" (Pet. pp. 17, 19). Petitioners also claim that the circuits are in conflict in applying Harlow v. Fitzgerald, 457 U.S. 800 (1982) (Pet. pp. 17, 18). Neither claim merits review by this Court. The record below conclusively establishes that petitioners violated constitutional rights "clearly established" by decisions of this Court and the Third Circuit. Likewise, petitioners' claim of conflict among the circuits finds no support in the numerous qualified immunity decisions of the courts of appeals since Harlow.

I. THE RECORD DOES NOT SUPPORT PETITIONERS' CLAIM THAT THE COURT BELOW APPLIED AN IMPROPER QUALIFIED IMMUNITY STANDARD.

A. Petitioners' Unreasonable Conduct Formed the Basis for the Trial Court's Award of Damages.

To support their claim that the court below applied an improper qualified immunity standard, petitioners state that the liability-creating conduct upon which damages were

awarded was their failure to provide Sourbeer with "periodic reviews from April to October 1977 ...." [Pet. p. 22]. Petitioners flatly misstate the wrongful conduct upon which damages were awarded. It is clear from the record that while petitioners conducted periodic reviews, damages were awarded because Sourbeer's isolation was continued from month to month when no reasons existed to justify such confinement. (Pet. pp. 134a-136a).

As noted above, Sourbeer's complaint alleged that prison officials had acted unreasonably in continuing to confine him in isolation when there were no longer valid reasons for such isolative confinement. Following extensive stipulations concerning the nature of Sourbeer's confinement, the fact that he was free of misconducts during the entire twelve months of segregation, the absence of psychiatric or psychological reasons supporting continued isolation and the fact that other unsentenced prisoners were in general population during the time of his segregation, the parties had requested the trial court to decide the case on their cross-motions for summary judgment. (Pet. pp. 149a-150a). The court identified as a central issue in the case the periodic reviews that were conducted by petitioners and, noting the "cryptic and often contradictory" (Pet. p. 151a) written decisions that followed the periodic reviews, the court concluded that a trial was necessary to permit a "fuller factual development of the reasons for plaintiff's continued administrative confinement." (App. 8a).

In its decision following the trial, the court reviewed the testimony of petitioners with respect to their reasons for continuing Sourbeer in isolation. The court concluded that while there was a need to initially hold respondent in isolation because petitioners had no information about him,

(Pet. p. 130a), petitioners had failed to demonstrate any legitimate reason for his prolonged confinement. (Pet. pp. 134a-136a). The court noted that Sourbeer had never violated prison rules during his twelve months in isolation and that while petitioners had alluded in their reviews to Sourbeer's "programmatic needs" being met by continued confinement, the court noted that there had never been a psychiatric or psychological evaluation of respondent. (Pet. p. 134a). Simply stated, the trial court could find nothing in the evidence offered by petitioners that demonstrated security or other legitimate institutional goals were advanced in any measure by respondent's prolonged confinement. In the absence of such evidence, the trial court found that while Sourbeer's confinement had in fact been reviewed periodically, the reviews from April 1977 to his release in October 1977 were conducted in "rote fashion," as petitioners continued to mechanically apply reasons that initially justified Sourbeer's early segregation. (Pet. p. 136a).

The Third Circuit affirmed the lower court's decision that respondent had been denied due process. The court reviewed the evidence relied upon by the trial court and concluded that there was adequate support in the record that while prison officials had in fact conducted periodic reviews, the reviews from April to October 1977 were "perfunctory" in nature, 791 F.2d at 1101, Pet. p. 381. Citing this court's decision in Parratt v. Taylor, 451 U.S. 527, 540 (1981),[4] the court held that that Sourbeer had been

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[4]Citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965), this court in Parratt stated that "the fundamental requirement of due process is the opportunity to be heard and it is an opportunity which must be granted at a
(Footnote Continued)

denied "the most fundamental right of due process: a meaningful opportunity to be heard." Id. The Third Circuit noted that petitioners had failed to call as witnesses those officials who had "professional dealings or day-to-day contact" with Sourbeer and instead relied exclusively on parties who had only limited or indirect contact with respondent. 791 F.2d at 1102, Pet. p. 40a.[5] The court also noted that its own review of the record revealed that the periodic reviews "consistently misstated" respondent's sentencing status during isolation and that this "careless repeated error" was added support for the district court's finding that petitioners' conduct in continuing Sourbeer's isolation from month to month was unreasonable. Id.

While petitioners now claim that liability was found because petitioners did not conduct periodic reviews of Sourbeer's isolation, the record is abundantly clear that it was petitioners' unreasonable actions in confining Sourbeer from month to month in the absence of legitimate reasons for such confinement that formed the basis for the lower court's award of damages.

B. Respondent's Right to Be Free From Unreasonable Conduct Was Clearly Established in 1977.

Petitioners claim that the Third Circuit applied an improperly broad view of "clearly established right" when it denied immunity despite Sourbeer's failure to demonstrate that in 1977 case law clearly required that petitioners

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(Footnote Continued)
meaningful time and in a meaningful manner." Parratt, supra at 540.

[5]The evidence at trial introduced by respondent included records maintained by prison personnel assigned to the segregation unit. The records revealed that respondent exhibited consistently good behavior during the entire period of his confinement in segregation.

conduct such periodic reviews of segregated prisoners.[6] As noted above, this argument ignores the fact that both courts below identified petitioners' wrongful conduct as continuing Sourbeer's segregation from month to month when no reasons were present to justify such confinement. In applying Harlow, the task before the lower courts was to determine whether in 1977 due process required that petitioners have valid reasons in continuing to confine a prisoner in segregation. Based upon the law in the Third Circuit and decisions of this Court, the courts below properly held that in 1977 it was "clearly established" that a prisoner had a due process right to be free from the unreasonable acts of prison officials.

The issue of qualified immunity was thoroughly briefed by the parties and fully considered by the trial court in two pre-trial decisions. (App. 1a-9a, Pet. pp. 140a-152a). In applying Harlow, the trial court looked to the state of the law in 1977 with respect to a segregated prisoner's right to due process of law. Relying on three pre-1977

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[6]Petitioners' assertion that the Third Circuit's decision in People of Three Mile Island v. NRC, 747 F.2d 139 (3d Cir. 1984) "dilute[s]" the qualified immunity standard of Harlow is without merit. In People of Three Mile Island, in a decision joined by Justice Stewart, the court held the Nuclear Regulatory Commissioners were entitled to qualified immunity when they failed to grant appellant's request for a hearing on a Venting Order. Employing a common sense approach to the issue of whether governing case law would have given reasonable officials cause to know at the relevant time that their acts or omissions violated plaintiff's rights, the court held that while it would not insist on "precise factual correspondence between the conduct at issue and reported case law" neither would it "require governmental officials to predict the course of the law." Id. at 145, 148. In determining whether a right is clearly established, the Third Circuit demands "some but not precise factual correspondence" and requires that "officials apply general, well developed legal principles." Id. at 144. Such an approach, the court held, "strikes the balance between the competing interests" that this Court identified in Harlow.

decisions of the Third Circuit,[7] concerning Pennsylvania prisoners who had been placed in segregation, the court found that segregation and population were not interchangeable forms of confinement and that the decision to confine an inmate in segregation "trigger[ed] due process protections". (App. 8a). In denying petitioners' immunity, the court held that

> the clear import of the [Third Circuit cases] cited ... is that prison authorities may not act arbitrarily in transferring a prisoner from general prison population to segregation. This requirement of reasonable action ... was a requirement which we believe to have been clearly established at the time of plaintiff's transfer. (Emphasis supplied). (Pet. p. 148a).

In affirming the district court's decision denying petitioners' immunity, the Third Circuit examined its prior cases concerning prisoners in segregation and concluded that Sourbeer's right to due process was "clearly established within the meaning of Harlow ...." 791 F.2d at 1104, Pet. p. 51a. The Third Circuit rejected, as had the trial court, petitioners' attempt to distinguish the Gray, Tyrrell and Biagiarelli decisions on grounds that they did not apply to unsentenced inmates. The court noted that petitioners had failed to suggest any basis "for a reasonable officer to assume that an unsentenced inmate is entitled to less

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[7] Gray v. Creamer, 465 F.2d 179, 185 (3d Cir. 1972)(placement of prisoner in administrative confinement "without either notice of the charges or a hearing does not meet ... minimal due process requirements. This decision is consistent with a great number of federal court decisions indicating that the Fourteenth Amendment to the United States Constitution requires that certain safeguards accompany the imposition by state prison authorities of substantial punishment"); U.S. ex rel. Tyrrell v. Speaker, 471 F.2d 1197, 1203 (3d Cir. 1973)(decision to impose segregation must be "based on facts rationally determined...."); Biagiarelli v. Sielaff, 483 F.2d 508, 510 (3d Cir. 1973)(prisoner placed in administrative segregation "entitled to either written notice of the basis for his removal from the prison population and the opportunity to rebut the charge, or a hearing").

process than sentenced inmates...." 791 F.2d at 1103, Pet. p. 48a. Moreover, as the district court had noted, one of the Third Circuit opinions, United States ex rel. Tyrrell v. Speaker, supra involved, like the present case, an unsentenced prisoner who had been placed in segregation after being transferred to a state prison from a county jail. (Pet. p. 144a). The Third Circuit also failed to find persuasive petitioners' claim that the Gray, Tyrrell and Biagiarelli decisions were not controlling because they wrongly identified the Constitution and not the Pennsylvania regulation governing segregation as the source of a prisoner's liberty interest in general population. The court acknowledged that its earlier decisions suffered from a faulty rationale[8] in light of this Court's decision in Hewitt v. Helms, 459 U.S. 460 (1983), but concluded that in 1977, petitioners "were on notice of Sourbeer's liberty interest and his concomitant right to due process." 791 F.2d at 1104, Pet. p. 50a.

For the first time in this Court, petitioners, borrowing from the dissenting opinion below, contend that the Third Circuit's reliance on the Gray, Tyrrell and Biagiarelli cases was misplaced as those decisions did not establish "standards to be used in reviewing inmates placed in segregation." (Pet. p. 23). As noted by the majority below, petitioners did not advance this argument on appeal nor did they raise the matter before the district court. 791 F.2d at 1104, n.8, Pet. p. 51a. As this Court has noted on many occasions, it is only in exceptional cases "that

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[8] ["A] reasonable official should not fail to respect a person's constitutional rights because the rationale behind the cases establishing those rights may be faulty." 791 F.2d at 1104, Pet. p. 51a.

questions not pressed or passed upon below are reviewed" in this Court. Duigan v. United States, 274 U.S. 195, 200 (1927). Nothing presented in the petition suggests that this is the exceptional case that justifies waiving this fundamental principle of review by this Court.

In rejecting the petitioners' qualified immunity claim, the Third Circuit faithfully adhered to the immunity standard set forth in Harlow. Identifying petitioners' liability-creating conduct as their unreasonable conduct in continuing Sourbeer's isolation from month to month in the absence of any reasons justifying such confinement, the court, relying on its own precedents, concluded that in 1977 reasonable prison officials would have known that segregative confinement "trigger[ed] due process rights" (Pet. p. 46a), the most fundamental of which is freedom from arbitrary action. Petitioners' claim that the law of "prisoner due process was in a state of flux" in 1977 (Pet. p. 24a), ignores the long line of decisions of this Court cited by the respondent in courts below holding that the Due Process Clause was "intended to secure the individual from the arbitrary exercise of the powers of government." Hurtado v. California, 110 U.S. 516; 527 (1884) (quoting Bank of Columbia v. Okely, 4 Wheat. (17 U.S.) 235, 244 (1819). In Wolff v. McDonnell, 418 U.S. 539 (1974), this Court's seminal prisoners' rights case, the Court held that "[p]risoners may claim the protection of the Due Process Clause" and that the "touchstone of due process is protection of the individual from arbitrary action of government, Dent v. West Virginia, 129 U.S. 114 (1889)." Id. at 556, 558. Because the issue of qualified immunity was decided in conformity with Harlow, and because the petition raises only questions turning exclusively on the facts of this case, certiorari should be denied.

II. THE COURTS ARE NOT IN CONFLICT WITH RESPECT TO THE "CLEARLY ESTABLISHED" REQUIREMENT OF HARLOW.

In an effort to attract this Court's attention, petitioners assert that the courts are in conflict with respect to the "clearly established" requirement of Harlow v. Fitzgerald, supra. (Pet. p. 28). This claim finds no support in the numerous qualified immunity decisions of the courts of appeals rendered since Harlow.[9] While courts have noted that the question of what constitutes a "clearly established" right was not resolved in Harlow, supra at 818 n.32, there is no open conflict, direct or in principle, between the circuits in determining whether constitutional rights are "clearly established." The absence of a square and irreconcilable conflict among the circuits on this issue is best evidenced by the fact that no court of appeals or district court has acknowledged that courts have adopted conflicting standards in determining whether rights are "clearly established."

Contrary to petitioners' claim, the Third Circuit in People of Three Mile Island, supra, did not find that the courts of appeals were in conflict in applying Harlow. In People of Three Mile Island, the court surveyed decisions from other courts and discussed what it viewed as the different "approach[es]" that courts have employed in determining whether a right is "clearly established." People of Three Mile Island, supra at 144. The Third

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[9] Petitioners' claim of conflict among the circuits is apparently based on a student law review article cited in People of Three Mile Island, supra, which claimed that some courts in applying Harlow had "demanded strict factual correspondence" between the case at hand and prior cases while other courts demanded "less factual correspondence...." Comment, Harlow v. Fitzgerald: Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983, 132 U.Pa.L.Rev. 901, 923 (1984).

Circuit's view that some courts require "strict factual identity" and others require officials to "relate established law to analogous factual settings" is not shared by other circuits as no other court has found that the circuits are applying either approach in deciding whether officials are entitled to qualified immunity. Id.[10] Significantly, in the decisions cited by petitioners as allegedly favoring one view over the other, the courts themselves make no reference to either approach in determining whether a right is "clearly established" within the meaning of Harlow. Because there is no real or intolerable conflict in principle among the circuits in determining qualified immunity for state officials, certiorari should be denied.

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[10] Certiorari was denied in a case from the Eleventh Circuit, a circuit which petitioners claim applies a broad view of "clearly established" right. Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982), cert. denied 464 U.S. 932 (1983).

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 28, 1986

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GREGORY S. SOURBEER, :
Plaintiff :
vs. : CIVIL ACTION NO. 79-0748
WILLIAM ROBINSON, et al. :
Defendants :

M E M O R A N D U M

The parties in this case have filed stipulations of undisputed facts, and cross motions for summary judgment. These motions are now ripe for disposition. Plaintiff, an inmate at the State Correctional Institution at Camp Hill has brought suit against various present and former officials of the Bureau of Correction. The cause of action is focused on a period of more than a year, from October 13, 1976 to October 27, 1977, during which plaintiff was confined in the Restricted Housing Unit (RHU) at SCI Camp Hill in administrative custody status.

Plaintiff was first transferred to Camp Hill from the Lancaster County Prison on October 13, 1976, following a conviction of first degree murder in Lancaster County Court.[1] Plaintiff was then fifteen years old. Upon arrival at Camp Hill and during the period in issue, plaintiff was an unsentenced prisoner and was therefore classified as an H.V.A. prisoner (hold for various authorities). (U.F. 12). While confined in administrative custody, plaintiff was denied entertainment and recreational privileges available to inmates in general population; required to eat all meals in his cell; permitted only one hour of exercise per day, Monday through Friday, outside of his cell; not permitted

[1]Plaintiff was transferred because the Lancaster County authorities viewed him as a security risk and felt that he could receive proper supervision at SCI Camp Hill (U.F. 10).

exercise on Saturdays and Sundays; denied regular visiting privileges available to inmates in population. Additionally, plaintiff was not permitted to go to the law library, was denied access to vocational training and regular educational programs available to other inmates, and was not permitted to attend religious services in the prison chapel. (U.F. 18-25). Plaintiff's status was reviewed about once a month, but he was continued in administrative custody until October 27, 1977, when he was finally sentenced on the murder conviction.

Plaintiff asks that the court enter declaratory summary judgment in his favor thereby deciding that defendants denied him due process of law in initially placing him in segregation, in failing to conduct meaningful periodic review of his confinement and in confining him in isolative segregation for more than twelve months without valid and compelling reasons. Plaintiff also contends that he was arbitrarily denied the right to freely practice his religion and that he is also entitled to summary judgment on this ground. Defendants argue, in support of their own motion and in opposition to plaintiff's, that plaintiff enjoyed no protectable interest in placement in the prison's general population, that the process accorded was adequate and that the lack of permission to attend congregational worship services did not violate plaintiff's rights, if extant, were not clearly established when administrative custody was imposed.

By letter of October 20, 1983, defendants have properly admitted that, based on the case of Drayton v. Robinson, ___ F.2d ___ (3d Cir., October 17, 1983), plaintiff did have a protectable liberty interest in being in the general prison population rather than in the RHU. The interest is defined in part by the two administrative

memoranda issued by the Bureau of Prisons relative to HVA cases. The first, in effect from March 17, 1975 to January 7, 1977 provides in pertinent part as follows:

> Although it may be desirable and necessary to segregate H.V.A. cases, there is no legal requirement to keep H.V.A. cases physically separated, when programmatic considerations warrant housing with sentenced inmates, this is permissible.... H.V.A. cases cannot be required to work or participate in programs. If the inmate requests work or program placement, he may be evaluated by the staff for such placement subject to certain guidelines. A). Work should be on a supervised detail. Regular institutional wage regulations apply. B). Short-term program placement is permissible where adequate supervision is available.

On January 7, 1977, the language just quoted was superseded by a second memorandum which provided in pertinent part that

> Generally H.V.A. cases shall be assigned to Administrative Custody. Exceptions are: 1) Medical cases requiring hospital or infirmary placement. 2) Disciplinary cases from the county or as a result of misconduct who require disciplinary custody. The institution shall determine the level of Administrative or Disciplinary Custody (close or maximum) based on the individual circumstances on a case by case basis.... H.V.A. cases are excluded from program participation and work assignments. They are limited to the routine activities of the Administrative Custody Unit.

Finally, on April 7, 1977, a further memorandum directed that prison officials accord a formal hearing when an H.V.A. case was received at an institution to determine the housing category in which the individual would be placed. Although it could be argued that the H.V.A. memoranda contain no mandatory, substantive standards applicable to the decision to place in administrative segregation, the court in Drayton found that these memoranda were to be read in pari materia with Administrative Directive 801 which does contain specific criteria and procedures.

Having determined that plaintiff enjoyed a protectable liberty interest, we determine whether that interest was infringed by his confinement in the R.H.U. As

is pointed out in the briefs, there are two facets to this analysis: -one procedural and one substantive. We first apply the procedural requirements to the facts of this case. In Drayton, the court noted that due process does not necessarily require that the procedures detailed in the administrative directive be strictly followed. Slip. op. at 10. Rather, the relevant guidelines for our purposes are set out by the Court in Hewitt v. Helms, ___ U.S. ___, 103 S.Ct. ___, 74 L.Ed.2d 675 (1983):

> We think an informal, nonadversary evidentiary review [is] sufficient both for the decision that an inmate represents a security threat and the decision to confine an inmate to administrative segregation pending completion of an investigation into misconduct charges against him. An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation. Ordinarily a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be ineffective. So long as this occurs, and the decision maker reviews the charges and then available evidence against the prisoner, the Due Process Clause is satisfied. This informal procedure permits a reasonably accurate assessment of probable cause to believe that misconduct occurred, and the "value [of additional 'formalities and safeguards'] would be too slight to justify holding, as a matter of constitutional principle" that they must be adopted. Gerstein v. Pugh, supra, 470 U.S., at 122.

Id. at ___, 74 L.Ed.2d at 691. The Court also recognized the necessity of periodic review:

> Of course, administrative segregation may not be used as a pretext for indefinite confinement of an inmate. Prison officials must engage in some sort of periodic review, of the confinement of such inmates. This review will not necessarily require that prison officials permit the submission of any additional evidence or statements. The decision whether a prisoner remains a security risk will be based on facts relating to a particular prisoner -- which will have been ascertained when determining to confine the inmate to administrative segregation -- and on the officials' general knowledge of prison conditions and tensions, which are singularly unsuited for "proof" in any highly structured manner.

74 L.Ed.2d at 692, n.9. We realize that Hewitt is not on the facts identical to the case before us, which does not involve a specific charge of misconduct, but we believe the guidelines defined by the Court can easily and appropriately be applied to this case.[2]

Applying the relevant criteria, we must reluctantly conclude that material factual issues exist which prevent us from entering summary judgment in favor of any of the parties. We are unable to come to any definite or satisfactory resolution with respect either to the procedural or substantive claims. Procedurally, Hewitt requires an initial, informal review of a prisoner's case before he is committed to administrative custody. The Court also requires that the prisoner be afforded some notice and an opportunity to be heard. Although these latter requirements may be less useful in a case, as the present one, where no specific incident of misconduct forms the basis for the confinement, we think Hewitt requires and it is not unreasonable to expect that the inmate initially be given an opportunity to present his views. Further, Hewitt requires periodic review of an administratively confined inmate's case on an individual basis to justify further confinement.

In the present case, although it does not appear that plaintiff was given notice or any opportunity to be heard when he was initially received into administrative

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[2]We acknowledge there is some authority to suggest that, where there is no specific charge of misconduct, the procedural safeguards to an assignment of administrative custody must be even more strict, See U.S. ex rel. Hess v. Cuyler, 452 F.Supp. 256 (E.D. Pa. 1978). This case pre dates Hewitt, however, and, absent controlling authority to the contrary, we deem it prudent to apply the standards expressed in Hewitt to the case before us.

custody at SCI Camp Hill, he was interviewed relative thereto approximately one month later, on November 17, 1976. (U.F. 44, 45). Thereafter, the plaintiff was seen by the P.R.C. and his case reviewed once a month until his eventual release from the RHU. In every case, of course, the decision of the P.R.C. was to continue plaintiff in administrative custody.

Plaintiff complains that the monthly reviews were not "meaningful" as mandated by Hewitt because they amounted to no more than a wooden application of a general policy to detain HVA inmates in administrative custody rather than a proper focusing on plaintiff's individual needs. Defendants argue that this argument blurs the distinction between procedural and substantive due process. Certainly, it is true that the procedural and substantive issues intersect in the phrase "meaningful review." That is, plaintiff appears to argue that the review accorded his case was procedurally defective because it did not include consideration of those individual factors which would lead a reasonable person to conclude that further confinement in the RHU would serve no legitimate and useful purpose. Thus, the alleged procedural defect led to arbitrary confinement and, hence, a substantive violation.

At this point, we encounter difficulties. We agree with plaintiff that Hewitt requires that periodic review hearings focus on facts relating to a particular prisoner. In this regard, we note that it has been stipulated that plaintiff was not given, during his confinement in administrative custody, a complete psychological and psychiatric examination. (U.F. 76). We also note that plaintiff was never charged with a major or minor misconduct. (U.F. 72). We are informed that "[o]ther factors considered by the P.R.C. in plaintiff's case were

his sentence status and his age." (U.F. 73). The P.R.C. decisions are cursory and cryptic. Some appear to reflect a concern for plaintiff's needs for supervision and special programming (U.F. 46, 51, 52, 54, 55); others tersely express concerns rooted in plaintiff's age (16) and, perhaps concomitant, security risk (N.T. 47, 50); still others suggest that plaintiff's H.V.A. status was the only relevant factor considered by the P.R.C. in concluding that plaintiff should be continued in the RHU. (N.T. 48, 53). We believe Hewitt requires that the P.R.C. consider more than H.V.A. status in reviewing plaintiff's case, but we are unable to determine here on the record before us whether or not it has really done so.

Substantively, plaintiff argues that the decision to confine him in the RHU was arbitrarily and unreasonably based solely on his H.V.A. status. Again, we are presented with a diverse collection of undisputed facts. Plaintiff was never cited for misconduct (U.F. 72) and had never been given a complete psychological and psychiatric examination (U.F. 76). Plaintiff was released into the general population shortly after being sentenced by the Lancaster County Court (U.F. 74). It is admitted by defendants that there were a number of juveniles at SCI Camp Hill, apparently in the general population.[3] What are we to make of these facts? On the one hand, the monthly review reports suggest that individual factors of programming and security were considered by the P.R.C. On the other hand there is evidence to suggest that defendants kept plaintiff in the

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[3]Apparently, there is some dispute as to the number of juveniles incarcerated in Camp Hill. The juvenile population was being phased out of Camp Hill to juvenile detention centers from 1975-77.

RHU because of his H.V.A. status and that his status was the only determinative facts considered by the P.R.C. at the periodic reviews. However, to so conclude at this time, would be to draw inferences from the facts which we may not do summarily. We feel that a resolution of these issues requires a fuller factual development of the reasons for plaintiff's continued administrative confinement. Because the merits of plaintiff's claim regarding denial of his right to practice his religion hinges on the legitimacy of his confinement in RHU, we may not resolve this issue at present.

We briefly consider the final basis on which defendants claim entitlement to summary judgment. Defendants argue that they are entitled to qualified good faith immunity pursuant to Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) because, whatever rights this court may not find the plaintiff to have had, such rights were not "clearly established" at the time defendants acted to administratively confine him. Plaintiff has cited several appellate cases from this circuit which predate plaintiff's confinement and which suggest that administrative custody does trigger due process protections. See Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972); United States ex rel. Tyrrell v. Speaker, 471 F.2d 1197 (3d Cir. 1973); Biagiarelli v. Sielaff, 483 F.2d 508 (3d Cir. 1973). Apparently, prison authorities understood the law at the time of plaintiff's confinement to require due process hearings, as evidenced by the April 7, 1977, memorandum to prison superintendents from Commissioner Robinson regarding H.V.A. cases. In the letter attached as exhibit B to plaintiff's supplemental brief Commissioner Robinson refers to "court rulings" which require formal hearings to determine housing categories. Although the law in 1976-77

may have not crystallized in precisely the manner later expressed in Hewitt, similar protections were required. Under these circumstances, we cannot find that a right giving rise to due process was not clearly established at the time of defendants' actions here, and so cannot give the defendants the benefit of qualified good faith immunity as defined in Harlow.

An appropriate order will be entered.

/s/
William W. Caldwell
United States District Judge

Date: April 2, 1984

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CLERK

(3)

NO. 86-419

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1986

ERNEST S. PATTON, RONALD J. MARKS,
J. HARVEY BELL and WILLIAM HARRISON,
Petitioners

v.

GREGORY S. SOURBEER,
Respondent

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ARGUMENT

I. A. In the petition for writ of certiorari, we presented to the Court the reasons why the Court of Appeals' broad formulation of the qualified immunity standard in actions under 42 U.S.C. § 1983 does not comport with recent decisions of this Court and demonstrates a conflict with approaches to immunity taken by other Courts of Appeals in the wake of Harlow v. Fitzgerald, 457 U.S. 800 (1982). In opposition to the petition, respondent Sourbeer asserts that this "is an unremarkable case involving well-established legal principles" which does not present an important question of federal law. (Resp. Br. p. 5) Apparently, however, this Court does not agree

with respondent since it has granted certiorari to review a case similar to this one: Anderson v. Creighton, No. 85-1520 (certiorari granted June 30, 1986). The question upon which certiorari has been granted in Anderson v. Creighton is as follows:

> When the general legal rule relevant to the constitutionality of an official's behavior makes reference to the circumstances of the particular case, is the qualified immunity provided by Harlow overcome by a mere showing that the general legal rule was well established, or must the court further determine that the official could not have reasonably believed that his own conduct was lawful in light of the facts and circumstances as they reasonably appeared to him.

Anderson v. Creighton, No. 85-1520 (Pet. for Writ of Certiorari, p. i, filed March 14, 1986), noted at 54 U.S.L.W. 3718.

While Anderson v. Creighton is an action brought against a federal official directly under the Constitution pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the official there moved for summary judgment on Harlow immunity grounds. See Creighton v. City of St. Paul, 766 F.2d 1269, 1271 (8th Cir. 1985). This Court repeatedly has stated that there is no logical basis for distinguishing between the immunity standard for federal officials in actions under Bivens and the immunity standard for state officials in actions under 42 U.S.C. § 1983. See Harlow v. Fitzgerald, 457 U.S. at 818 n. 30, Butz v. Economou, 438 U.S. 478, 504 (1978).

Therefore, at the very least, this petition for writ of certiorari should be held pending the Court's decision in Anderson v. Creighton. In any event, respondent is simply in error when he suggests that the Third Circuit's broad formulation of the immunity standard does not present an important question warranting review by this Court.

B. As the Eighth Circuit had done in Anderson v. Creighton, the Third Circuit here concluded that the mere existence of a general legal principle--in this case, due process--was sufficient to place petitioners on notice that their periodic reviews of Sourbeer's administrative segregation status in 1976-77 violated a clearly established right to specific, detailed

reviews. Our arguments in the petition that the law of prisoner due process was in a state of flux in 1976-77, and therefore Sourbeer's right was not "clearly established" within the meaning of Harlow, are amply supported by the fact that this Court's decision in Hewitt v. Helms, 459 U.S. 460 (1983), was the first time the Court had held that internal prison regulations, like those at issue here, created a protectible liberty interest requiring procedures before an inmate could be placed or continued in administrative segregation status in a state prison.[1] Our

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[1]In no less than thirteen places in his brief, Sourbeer refers to his administrative segregation status as "isolation" or being housed in an "isolation cell." This is a clear misstatement of the record. The cellblock in which he was housed was one of

(FOOTNOTE CONTINUED ON ON NEXT PAGE)

position is met by a simplistic response from Sourbeer to the effect that, in his view, it has been clear from the early 1800's that individuals are protected by the Due Process Clause "from the arbitrary exercise of the powers of government." (Resp. Br. p. 12) Respondent's argument clearly begs the central question in this case.

(FOOTNOTE CONTINUED)

several nearly identical blocks at the prison--tiers of cells back-to-back facing a group of windows. (Court of Appeals app. 150a, 102a) While his freedom of movement around the institution was restricted, he was not "isolated" either from other inmates or staff, and was permitted privileges not inconsistent with his status. (Pet. App. 97a)

When faced with a claim of Harlow immunity from a state official, the duty of a court is to evaluate the "objective reasonableness of [the] official's conduct, as measured by reference to clearly established law." Harlow, 457 U.S. at 818. The Court's decisions in Davis v. Scherer, 468 U.S. 183 (1984), Mitchell v. Forsyth, No. 84-335 (June 19, 1985), and Malley v. Briggs, No. 84-1586 (March 5, 1986), make clear that the existence of a broad, general legal principle is, at best, only the starting point in a proper immunity analysis. Indeed, in Davis, even though it was acknowledged that a discharged public employee was entitled to "some kind of hearing," the Court determined that the defending officials were entitled to immunity

because previously "the Court had not determined what kind of a hearing must be provided" or "specif[ied] any minimally acceptable procedures for termination of employment." 468 U.S. at 192 n. 10.

Similarly, in Malley v. Briggs, the Court reaffirmed that a police officer is entitled to immunity for an arrest based on a warrant "if [he] acted in an objectively reasonable manner," which can only be resolved by a reference to the facts and circumstances confronting the official. Slip op. at 5. Accordingly, both Davis and Malley demonstrate that the existence of a generalized legal standard, such as that advocated by respondent here, does not resolve the qualified immunity question. Instead, as this Court has made

clear, the appropriate immunity analysis requires an examination of whether it was objectively reasonable for the executive official to have known that he would be found liable. As the dissent below properly noted, it cannot be objectively reasonable to hold petitioners liable when to do so requires an extension by implication of three narrow holdings of the Court of Appeals, none of which addressed the peculiar circumstances of Sourbeer's facts, and all of which were based upon a legal analysis subsequently determined to be incorrect by this Court. (Pet. App. 83a-86a).

If respondent is correct, Harlow becomes a standardless test. If immunity can be denied simply because there exists a general legal principle

such as "due process," then the danger of "hindsight-based reasoning," which was specifically rejected in Mitchell v. Forsyth, is apparent.

Our position that a broad view of "clearly established" is not consistent with this Court's decisions is fully supported by the policies underlying Harlow immunity. "Implicit in the idea that officials have some immunity-- absolute or qualified--for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." Scheuer v. Rhodes, 416 U.S. 232, 242 (1974). For this reason, respondent's insistence upon reiterating that petitioners erred

in retaining Sourbeer in segregation makes no sense. Even assuming they were mistaken in deciding to retain a 15-year-old, unsentenced, first-time offender in segregated custody away from the more sophisticated general inmate population, and even assuming the courts below applied the correct standard in evaluating the substance of the decisions to retain him, the issue for purposes of Harlow immunity is not whether the officials erred in their judgment; the issue is whether Sourbeer's right to detailed periodic reviews was clearly established before Hewitt v. Helms, 459 U.S. 460 (1983).[2]

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[2]In this regard, respondent's characterization of our argument, to the effect that we simply disagree with the holding that prison officials must conduct regular periodic reviews of a

(FOOTNOTE CONTINUED ON NEXT PAGE)

Moreover, the invocation of such broad phrases as "due process" or "equal protection" does not provide sufficient guidance to middle management executive officials like petitioners, even where it is established that inmates are, as a general matter, entitled to invoke the phrases. If this is the "clearly established" standard which respondent suggests the Court of Appeals properly has adopted, it is apparent that the Harlow immunity defense

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(FOOTNOTE CONTINUED)

segregated inmate, is a clear misstatement of our position. Obviously, after Hewitt v. Helms, such periodic reviews are required by due process. The issue is not whether such reviews are required, but whether it was objectively reasonable in 1976-77 that the kind of detailed reviews found to be necessary in this case were clearly required by the state of the law of prisoner due process at that time. Mitchell v. Forsyth, Slip op. at 23.

would be lost in cases even where there is a "legitimate question," Mitchell v. Forsyth, slip op. at 23 n. 12, or a "reasonable...disagree[ment]" among officials, Malley v. Briggs, slip op at. 5. Under these circumstances, all the dangers Harlow was designed to avoid would be resurrected. Clearly, this cannot be correct.

C. In what only may be described as a disingenuous attempt to persuade the Court not to reach the merits of petitioners' arguments on the Court of Appeals' erroneous formulation of the Harlow standard, respondent suggests (Resp. Br. pp. 11-21) that we have waived our right to argue that the Third Circuit has misapplied this Court's immunity decisions. Nothing could be further from the truth.

As the record discloses, petitioners specifically moved for summary judgment on Sourbeer's procedural due process claims based on Harlow immunity (Pet. App. 24a, 140a), moved the District Court for reconsideration of its refusal to grant immunity on these claims (Pet. App. 140a), renewed the argument in post-trial briefing before the District Court (Defendants' Post-Trial Memorandum filed Feb. 14, 1985, pp. 6-8), and specifically raised and briefed the issue in the Court of Appeals (Brief for Appellants field June 24, 1985, pp. 13-15 and 20-25; Reply Brief for Appellants/Cross-Appellees filed Aug. 26, 1985, pp. 15-25), including the filing of a petition for rehearing in banc (Pet. App. 3a) which

four judges of the Court would have granted. (Pet. App. 1a-2a) Obviously, there has been no waiver.

What respondent erroneously suggests is that, since we failed to persuade a majority of the panel below of our theory on the merits--that there is a distinction between the substance of a decision to segregate an inmate and the procedures required to place and retain an inmate in segregation (Pet. App. 37a)-- we therefore have waived our right to argue that Harlow immunity was improperly denied on respondent's procedural due process claim. To date, no court in this litigation has found a waiver, and the record simply discloses none. At worst, we failed to distinguish sufficiently for the panel the

difference between the substantive decision to place an inmate in segregation and what is required by due process in deciding to retain him there. (Pet. App. 51a)[3] Thus, there is no barrier to the Court's considering our immunity arguments.

II. A. In opposition to petitioners' suggestion in the petition that the Courts of Appeals have adopted inconsistent approaches to the proper application of the Harlow immunity standard, respondent makes no attempt to distinguish the cases we have cited or otherwise to demonstrate that the cases

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[3]Our briefs filed in the Court of appeals did distinguish between the process due for the initial placement in segregation and the process due upon periodic review of the segregation. The panel majority, however, did not accept the basis for our argument.

fail to indicate an inconsistency. Instead, respondent simply asserts that the best evidence for finding no conflict among the Circuits is the mere fact that no Circuit--other than the Third, of course--has expressly noted the inconsistent approaches. This argument apparently is premised upon the notion that, if no other court expressly mentions the presence of an inconsistency, there need be no further analysis by this Court to determine if, in fact, there is an inconsistency. Respondent's argument obviously is not correct.

B. Rather than being based simply upon a law review article, as suggested by respondent (Resp. Br. p. 13), our position that there has been an

inconsistency in approaches is amply reflected by the Third Circuit's express recognition of the inconsistency in People of Three Mile Island v. NRC, 747 F.2d 139, 144 (3d Cir. 1984), the decision which formed the basis for the broad immunity standard below, as well as by several decisions from other Courts of Appeals, some of which were cited in People of Three Mile Island. (Pet. pp. 29-31) The inconsistency of approaches is further illustrated by Creighton v. City of St. Paul, 766 F.2d 1269 (8th Cir. 1985), certiorari granted, No. 85-1520 (June 30, 1986). As we noted above, in Creighton the Court of Appeals refused to afford a federal official immunity in a civil rights action on the ground that the general principle at issue --a warrantless search of a residence in the absence

of exigent circumstances-- was well-settled and there was no need to inquire as to whether the official's belief in the lawfulness of his actions was "objectively reasonable." 766 F.2d at 1277. As also noted, the Court has granted certiorari in Creighton upon the petition of the Solicitor General of the United States.[4] Accordingly, review in this case is warranted because of this inconsistency among the Circuits. At a minimum, the petition should be held pending the Court's decision in Creighton.

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[4]Besides Anderson v. Creighton, the Court also recognized the significance of this issue in Whitley v. Albers, No. 84-1077 (March 4, 1986), but the Court there did not reach the question, having resolved the case on other grounds. Slip op. at 15.

CONCLUSION

For these reasons, and the reasons expressed in the petition for writ of certiorari, the petition should be granted and, upon review, the decision of the Court of Appeals should be reversed with directions to enter judgment for petitioners.

Respectfully submitted,

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No. 86-419

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Petitioners,

v.

GREGORY S. SOURBEER,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITIONERS BY THE STATE OF NEW JERSEY AND THE SIXTEEN AMICI THAT APPEAR ON INSIDE COVER

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QUESTION PRESENTED FOR REVIEW

Whether qualified immunity under *Harlow v. Fitzgerald* may be lost in the absence of prior case law which has both a legal and factual nexus to the alleged violation of constitutional rights.

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

This case presents significant questions relating to the precise meaning of the phrase "a clearly established statutory or constitutional right" for purposes of evaluating whether a public official is entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), from liability for damages against an action brought under 42 U.S.C. sec. 1983. This Court has yet to fully articulate what constitutes a

clearly established right. The Third Circuit, in *Sourbeer v. Robinson*, 791 F.2d 2727 (3rd Cir. 1986), adopted a broad view of a clearly established right to vitiate the Pennsylvania prison officials' qualified immunity defense. This position conflicts with the more demanding standard followed by other circuits since *Harlow*. If sustained, the Third Circuit's test would gravely weaken the firmly recognized qualified immunity defense for public officials performing discretionary functions, peculiarly hampering effective independent decision-making by public officers and undoubtedly disrupting the smooth operation of government by constantly exposing officials to protracted litigation. These concerns repeatedly have been expressed by this Court in highlighting the significance of the qualified immunity defense. *Davis v. Scherer*, 468 U.S. 183 (1984).

The Third Circuit's opinion is a matter of compelling importance not just to those jurisdictions in the Third Circuit, but in the others as well, because the law is unsettled regarding how to evaluate what constitutes a clearly established right. Amici attorneys general of the respective states believe the Third Circuit has charted a misdirected course in this area of law that necessitates correction. This brief is filed on their behalf pursuant to Rule 36.4, Supreme Court Rules of Court.

SUMMARY OF ARGUMENT

Government officials performing discretionary functions are shielded from liability for civil damages in a 42 U.S.C. sec. 1983 action unless their conduct "clearly violated statutory or constitutional rights of which a reasonable person would have known." *Har-*

low v. Fitzgerald, 457 U.S. 800, 818 (1982). Although this Court has articulated a definitive rule for qualified immunity, it has not fully explained what it means by the phrase "clearly established statutory or constitutional rights."

The Third Circuit employed an extremely broad view of what constitutes a clearly established right to strip the qualified immunity shield from the prison officials in this case. The lower court's misguided standard and its application seriously undermine the sound policy considerations that underpin the qualified immunity doctrine. Moreover, the Third Circuit's analysis readily conflicts with this Court's evolving principle in section 1983 cases that public officials should not lightly be deprived of qualified immunity protection. Amici submit that the Third Circuit's opinion, if affirmed, would irreparably weaken the qualified immunity defense for public officials, hinder effective independent decision-making by public officials and disrupt the smooth operation of government, particularly the day-to-day management of prisons.

ARGUMENT

THE COURT OF APPEALS MISAPPLIED THE "CLEARLY ESTABLISHED" RIGHT TEST OF *HARLOW V. FITZGERALD* TO ASSESS WHETHER DEFENDANTS SHOULD BE ACCORDED QUALIFIED IMMUNITY FROM LIABILITY FOR CIVIL DAMAGES.

The United States Court of Appeals for the Third Circuit held that Pennsylvania's prison officials were not entitled to qualified immunity from liability for monetary damages under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Sourbeer v. Robinson*, 791 F.2d 1094, 1103-1104 (3rd Cir. 1986). In rejecting the qualified

immunity defense, the court below embraced an extremely broad view of what constitutes an established right of which a reasonable person would have known—requiring only "some but not precise factual correspondence (with precedents) and demanding that officials apply general, well developed legal principles." *Id.* at 1103. Specifically, the circuit court referred to three cases in the early 1970's dealing with initial transfers of prisoners to administrative (segregated) custody which it said "clearly established that a liberty interest triggering due process was involved in administrative custody placements, and that procedural protections comparable to those required in *Hewitt v. Helms*, 459 U.S. 460 (1983), were required." *Id.*

The Third Circuit's open-ended test to ascertain what constitutes a clearly established right in the qualified immunity inquiry fatally conflicts with this Court's emerging principle that prior law must be virtually identical to the present case concerning the protectible interest and the scope of procedural due process at issue. Moreover, if the court of appeals' standard and the application of its standard were affirmed, a section 1983 complainant could easily vitiate the qualified immunity shield, a result that seriously would undermine the sound policy considerations detailed in *Harlow* and *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012 (1984), that support this protection.

In *Harlow*, this Court created an unmistakable objective test to define the limits of qualified immunity for officials performing discretionary functions. *Harlow v. Fitzgerald, supra*, 457 U.S. at 818-819.[1] Offi-

[1] Although *Harlow v. Fitzgerald, supra*, dealt with the avail-

cials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* at 818. Whether an official may prevail in his qualified immunity defense depends upon "the objective reasonableness of (his) conduct as measured by clearly established law." *Id.* No other circumstances are relevant to the issue of qualified immunity. *Davis v. Scherer, supra,* 468 U.S. at ___, 104 S.Ct. at 3018. The test is not what rights are established or not established; the test is what rights are clearly established. If the rights in question are not clearly established qualified immunity applies.

Since this Court has yet to precisely specify how to evaluate the state of the law to determine a clearly established right, *Harlow v. Fitzgerald, supra,* 457 U.S. at 818 n.32, the circuit courts and district courts painstakingly have grappled with this nettlesome question. This case affords this Court an opportunity to eliminate some of the confusion. Lower courts have created a divergence of opinion on the appropriate background of law to apply, as well as the proper time frame to consider, in deciding whether a constitutional right is clearly established. See, Petitioner's Brief for Writ of Certiorari at 29-31, and n.6, and also Comment, "Civil Rights: A Modification of the Qualified Immunity Defense in Actions Brought Un-

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ability of qualified immunity for federal officials (senior aides and advisors to the President), this Court, for purposes of immunity law, has drawn no distinction between suits brought against state officials under 42 U.S.C. sec. 1983 and suits brought directly under the Constitution against federal officials. *Harlow v. Fitzgerald, supra,* 457 U.S. at 818 n.30.

der 42 U.S.C. sec. 1983," 24 *Washburn L.J.* 630 (1985).

This Court's recent opinions, however, firmly suggest that a very close legal and factual nexus must exist between the prior law and the right that the plaintiff alleges has been violated. In *Procunier v. Navarette*, 434 U.S. 555 (1978), this Court held that state prison officials enjoyed a qualified immunity defense to a section 1983 claim brought by an inmate alleging unconstitutional mail confiscation. *Id.* at 565. Concluding that there was no clearly established constitutional right with respect to correspondence of convicted prisoners at the time the action arose, this Court distinguished several cases that obliquely addressed the censorship of prisoner's mail and soundly rejected numerous other cases that simply did not deal with the right of convicted prisoners in their mail. *Id.* at 565-566 and n.11.

The implicit requirement of a very close connection between the existing case law and the contested action was reinforced by *Mitchell v. Forsyth*, ___ U.S. ___, 105 S.Ct. 2806 (1985). See, *Benson v. Allphin*, 786 F.2d 268, 275-276 (7th Cir. 1986). In *Mitchell*, this Court found that defendant(s) were entitled to qualified immunity because the legality of warrantless national security wiretaps which occurred in 1970 was an "open" question at that time. *Id.* at 2818-2820. Even though pre-1970 case law had established that the use of warrantless electronic surveillance generally violated the Fourth Amendment, *Katz v. United States*, 389 U.S. 347 (1967), the *Mitchell* Court focused on the much narrower question of the legitimacy of wiretapping as directed against domestic threats to national security at the time former

Attorney General Mitchell authorized the complained-of wiretap. *Id.*, 105 S.Ct. at 2819-2820. This Court's subsequent invalidation of warrantless wiretapping in cases involving national security, in *United States v.United States District Court*, 407 U.S. 297 (1972) (Keith), did not negate the fact that at the time of the disputed wiretap, the law on this subject had yet to be clearly defined. *Id.* at 2820.

Taken together, *Procunier* and *Mitchell* demonstrate that a much closer factual correspondence must exist between the action under consideration and the decisions that establish the applicable law than the "some factual correspondence" test employed by the court below. *Sourbeer v. Robinson*, *supra*, 791 F.2d at 1103. The Third Circuit erroneously relied on its own precedents, *Gray v. Creamer*, 465 F.2d 179 (3rd Cir. 1972); *United States ex. rel. Tyrrell v. Speaker*, 471 F.2d 1197 (3rd Cir. 1973), and *Biagiarelli v. Sielaff*, 483 F.2d 508 (3rd Cir. 1973), to show that the prison officers had reason to know of plaintiff's liberty interest, and his concomitant right to due process. *Id.* at 1104. These cases, however, only remotely corresponded to the allegedly impermissible actions which the Third Circuit found gave rise to a constitutional violation. As discussed instructively by the dissent below, all three cases discussed only the initial transfer of prisoners from general to segregated confinement, rather than the precise question of what standards to apply when conducting periodic reviews of custodial status or concerning when a prisoner should be released from administrative custody. *Sourbeer v. Robinson*, *supra*, 791 F.2d at 1109 (Weis, J., dissenting). Only *Tyrrell* dealt with an unsentenced prisoner as here. But that case involved disciplinary,

as compared with administrative segregation. *Id.* Nor did these cases discuss what "meaningful" process was due after the initial transfer to more restrictive confinement, the narrow question at issue in this case. See *Davis v. Scherer*, *supra*, 468 U.S. at ___, 104 S.Ct. at 3019 n.10 (officials could reasonably conclude that they had provided plaintiff with the fundamentals of due process, since the Supreme Court had yet to specify any minimally acceptable procedures for termination of civil service employment).[2]

Indeed, to the extent that there was law in April 1977 as to the federally protected interests of prisoners, it suggested that the transfer of prisoners to more restrictive confinement and their continued segregated status were matters best left to the discretion of prison administrators, or at least, that the law in this area was unsettled. The line of cases relied upon by the Third Circuit essentially extracted a prisoner's liberty interest from the due process clause of the Fourteenth Amendment. *Sourbeer v. Robinson*, *supra*, 791 F.2d at 1104. However, various pre-1977 opinions by this Court made clear that the due process clause could not be the source of an inherent constitutional right to a particular custodial status, or could not be

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[2] Not until *Hewitt v. Helms*, 459 U.S. 460 (1983), six years after the contested actions here, did this Court indicate that Pennsylvania prison officials under their state law must engage in some type of periodic review for those inmates subject to administrative segregation. *Id.* at 477 n.9. However, this review "will not necessarily require that prison officials permit the submission of any additional evidence or statements" beyond that furnished at the time of the initial decision to confine an inmate to administrative segregation.

invoked to bar a transfer to a more restrictive custodial setting, see *Meachum v. Fano*, 427 U.S. 215, 223-227 (1976), reh. den. 429 U.S. 873 (1976); *Montanye v. Haymes*, 427 U.S. 236 (1976), thereby completely undercutting the fundamental premise upon which the early Third Circuit cases rested. The court below even acknowledged that its early cases relied on a faulty premise ultimately rejected by this Court. *Sourbeer v. Robinson, supra*, 791 *F.*2d at 1104.

Consequently, in 1977, the question whether prisoners had any protected interest under the Constitution concerning transfers to more restrictive quarters, and the level of procedural protections that might be required to vindicate those rights, was in a state of flux.[3] A reasonable prison official in Pennsylvania therefore could not clearly have known that plaintiff had a federally protected interest in confinement in the general prison population, such that as a matter of law he could not be placed in more restrictive quarters without certain procedural safeguards.[4]

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[3] *Hewitt v. Helms, supra*, conclusively resolved that administrative confinement "was the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration," and thus did not significantly affect a prisoner's freedom to justify protection as a liberty interest under the Constitution's due process clause. *Id.*, 459 U.S. at 468.

[4] The opinion below referred to certain Pennsylvania Bureau of Corrections regulations, in effect in 1977, that established procedures and substantive guidelines governing confinement in administrative custody. *Sourbeer v. Robinson, supra*, 791 F.2d at 1097, 1105-1108. In *Hewitt v. Helms, supra*, this Court held that these regulations created a liberty interest in general population status that was protected by the Fourteenth Amendment. *Id.*, 459 U.S. at 472. However, the Pennsylvania regulations are

The Third Circuit's exceedingly broad test to define clearly established rights under *Harlow* also defeats the policy considerations—repeatedly endorsed by this Court—that underlie the qualified immunity doctrine. By framing the immunity issue in terms of objective reasonableness and the presence or absence of clearly established law, this Court has struck a delicate and careful balance between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties. *Harlow v. Fitzgerald, supra,* 457 U.S. at 814-815. The public interest requires qualified protection of government officials to protect independent decision-making. *Id.* at 807; *Scheuer v. Rhodes,* 416 U.S. 232, 241-242 (1974). The *Harlow* and *Davis* test aims to prevent insignificant claims from going to trial by allowing the immunity question to be resolved objectively as a matter of law on summary judgment. *Id.*, 457 U.S. at 818. Otherwise, officials would be unremittingly subjected to the undesirable risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action and deterrence of able people from public service. *Id.* at 816.

Equally important, where the courts have not established clear authority which controls the particular factual scenario confronting state officials at the time of their actions, they are left to their own interpretation of the applicable requirements. Under the Third Circuit approach, they would become civilly liable if

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of no moment for purposes of this qualified immunity inquiry, since the Third Circuit's finding of clearly established law derived from its own prior interpretations of the federal due process clause in *Gray, Tyrrell* and *Biagiarelli,* rather than of Pennsylvania's statutory and regulatory law.

their interpretations turn out to be uncorrect even when they have no clear authority to inform their initial decision. Such an approach leads not only to undeserved civil liability but will ultimately lead to procrastination and inaction on the part of governmental officials. This is in direct conflict with the very purpose of this Court's limited immunity rule. As this Court has observed:

> Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all. *Scheuer v. Rhodes, supra,* 416 U.S. at 241-242.

Thus, the Third Circuit approach cannot be countenanced.

The Third Circuit's rule has other particularly objectionable consequences. It accords federal judges large discretion to comb decisional law, statutory and administrative codes for some fragile tether between the existing law and the contested action to warrant denial of qualified immunity. *Davis v. Scherer,* 468 U.S. at ___, 104 S.Ct. at 3021. Such unrestricted scrutiny needlessly would delve into assorted subjective factors, *i.e.*, a decision-maker's experiences, val-

ues and emotions, that influenced a discretionary decision. This would gravely undercut the objective test established by *Harlow*. *Harlow v. Fitzgerald, supra,* at 816-817. Inevitably, the Third Circuit's standard likely would expose public officials to liability for alleged violations of constitutional rights only peripherally related to the one at issue, including rights that were not clearly defined or even foreshadowed at the time of the disputed conduct.

The Third Circuit's rule also unduly burdens prison administrators who, unlike well-trained lawyers, cannot reasonably be expected to know the applicable case law, statutes and regulations, or understand their underlying intent. *Davis v. Scherer, supra,* 468 U.S. at ___, 104 S.Ct. at 3021 n.13. This Court in both *Harlow* and *Davis* adopted a test of "clearly established rights which a reasonable person would have known," but has refused to take into account the level of the "reasonable person," despite Justice Stevens' suggestion that it do so.[5] Prison officials, especially, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. *Id.*, 468 U.S. at ___, 104 S.Ct. at 3021. The judgment of prison officials often turns largely on purely subjective evaluations and on predictions of future be-

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[5] Justice Stevens has suggested as follows that an appraisal of reasonableness must be judged in light of the level of the official: "Some defendants, especially those without policymaking responsibility, may establish their defense by showing that they abided by the institution's regulations or by its long-followed practices. Other officials, whose exercise of discretion is given greater deference by the courts . . . may have a correspondingly greater duty to consider the legal implications of their conduct." *Procunier v. Navarette,* 434 U.S. 555, 570 (1978) (Stevens, J., dissenting).

havior. *Hewitt v. Helms, supra,* 459 U.S. at 474. To ascribe to them the same level of knowledge as lawyers, in order to be shielded from liability for civil damages, could well hinder their independence in discretionary decision-making. Rather than devoting their undivided attention to preserving security and the internal order of their institutions, prison officials would be preoccupied with avoidance of potential liability.

CONCLUSION

For these reasons, we respectfully urge this Court to grant petitioners' certiorari petition to fully articulate the meaning of the phrase "clearly established statutory or constitutional rights" in the qualified immunity rule, and to reject the Third Circuit's misguided construction of this standard.

Respectfully submitted,

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